Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

*Petitioner,*

v.

CITY OF ALAMOSA, et al.,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The Colorado Supreme Court**

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI
## VOLUME I
**(Pages A-1 through A-269)**

JOSEPH M. MONTANO
*Counsel of Record*
HARLAN S. ABRAHAMS
DIANE B. DAVIES
FAEGRE & BENSON
2500 Republic Plaza
370 Seventeenth Street
Denver, CO 80202-4004
(303) 592-5900

*Attorneys for Petitioner*
*American Water Development, Inc.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

274 pp

## INDEX TO PETITIONER'S APPENDIX

Page

VOLUME I

Opinion of Colorado Supreme Court (filed May 9, 1994) ..... A-1

Memorandum and Order of Partial Summary Judgment Dismissing the Applicant's Spanish or Mexican and Federal Land Grant Claims, dated July 5, 1990 ..... A-94

Transcript of July 5, 1990 Hearing of the Water Court Ruling on Partial Summary Judgment on land Grant Claims ..... A-101

Order Granting Applicant's Motion to Dismiss Tributary Claims, dated November 21, 1991, nunc pro tunc, October 10, 1991 ..... A-110

Transcript of October 10, 1991 Hearing of the Water Court Granting Applicant's Motion to Dismiss Tributary Claim ..... A-115

Transcript of November 21, 1991 Water Court Hearing Concerning Applicant's Motion for Due Process ..... A-119

Transcript of November 22, 1991 Water Court Hearing Denying Applicant's Motion for Due Process ..... A-121

Order Denying Applicant's Motion for Prehearing Conference and Oral Argument on the Issue of Entitlement, dated March 16, 1992 ..... A-127

Transcript of March 16, 1992 Hearing of the Water Court Denying Applicant's Request for Prehearing Conference and Oral Argument on the Issue of Entitlement ..... A-129

**INDEX TO PETITIONER'S APPENDIX** – Continued

Page

Order of Colorado Supreme Court Denying Petition for Rehearing, dated June 6, 1994 ..... A-131

Application for Underground Water Rights, filed by Applicants on December 31, 1986 ..... A-133

Report of the Surveyor General of New Mexico to Congress in 1860 ..... A-156

Treaty of Guadalupe Hidalgo, February 2, 1848 .. A-195

1854 Act Implementing Provisions of Treaty of Guadalupe Hidalgo, approved July 22, 1854 .... A-220

1860 Report of Senate Committee on Private Land Claims ..... A-227

1860 Act to Confirm Certain Private Land Claims in the Territory of New Mexico, approved June 21, 1860 ..... A-234

1864 Act to Amend An Act to Confirm Certain Private Land Claims in the Territory of New Mexico, approved June 11, 1864 ..... A-238

Senate Report 101-538, Concerning Baca Location No. 1 Land Acquisition and Study Act of 1990, dated October 18, 1990 ..... A-240

House Report 101-783, Concerning Exchanging Certain Lands in the State of new Mexico, dated October 1, 1990 ..... A-257

**INDEX TO PETITIONER'S APPENDIX** – Continued

Page

VOLUME II

Affidavit of Michael C. Meyer dated May 14, 1990, Offered in Response to Objectors' Motion for Partial Summary Judgment on the Land Grant Claims ..... A-270

Motion, With Recitation of Authorities, for Order Granting Applicant Due Process in Form of Notice, Evidentiary Hearing, and Discovery, dated November 1, 1990 ..... A-299

Applicant's Reply Brief in Support of Motion for Due Process, dated November 22, 1991 ..... A-307

Applicant's Offer of Proof in Support of Reply Brief on Motion for due Process, dated November 22, 1991 ..... A-336

Transcript of November 22, 1991 Water Court Hearing Concerning Applicant's Request for Due Process Hearing ..... A-345

Applicant's Request for Prehearing Conference and Oral Argument on Issue of Entitlement, dated February 18, 1992 ..... A-353

Applicant's Motion to Dismiss Tributary Claim, dated September 26, 1991 ..... A-356

Transcript of September 26, 1991 Water Court Hearing Concerning Applicant's Motion to Dismiss Tributary Claim ..... A-358

Transcript of October 10, 1991 Water Court Pretrial Hearing ..... A-360

[see also A-334]

Objectors' Opposition to Applicant's Motion to Dismiss Tributary Claim ..... A-362

**INDEX TO PETITIONER'S APPENDIX** – Continued

Page

Transcript of April 21, 1992 Water Court Hearing on Fees and Costs ..... A-365

Affidavit of Alison Maynard, dated December 5, 1991 ..... A-367

Brief of Appellant-Petitioner Before Colorado Supreme Court, dated November 23, 1992 ..... A-371

Reply Brief of Appellant-Petitioner Before Colorado Supreme Court, dated March 1, 1993 ..... A-375

Petition for Rehearing Before Colorado Supreme Court ..... A-377

Supreme Court of Colorado,
En Banc.

May 9, 1994.

Rehearing Denied June 6, 1994.

**Nos. 92SA141, 92SA263.**

**AMERICAN WATER DEVELOPMENT, INC., a Colorado corporation, Applicant-Appellant**

**v.**

**CITY OF ALAMOSA; County of Alamosa; Alexander Ranch; Darell Keith Alexander; Richard Angell; Baca Grande Water & Sanitation District; Fred Bauder; Harold L. Bennett; Richard Blumenhein; Bonanza Road Water Users, Owners and Objectors; Lena C. Chiles; Floyd D. Chiles; Terry R. Chiles; Cyril Clayton; Dave Collins; David P. Collins; Barbara J. Collins; Colorado Division of Wildlife; Colorado Water Conservation Board; Columbine Telephone Company; Conejos Water Conservancy District; Concerned Citizens of Crestone, Colorado and Vicinity; Richard E. Conour; Elizabeth A. Conour; Cotton Creek Ranch; Town of Crestone; Fred J. Davie; Douglas M. Davie; Michael R. Dennet; Tom Enos; Dennis L. Felmlee; Oliver Powell Roemer, III, Successor Trustee Under the Trusts Under the Will of Avis Neal Roemer; First Pegasus Corporation; Freel Ranch; Eugene W. Freel; Beverly Freel; Harold L. Freel; Terry Lee Freel; Fullenwider Ranch, Inc.; Ernest Lamar Goodwin; Haidakhandi Universal Ashram; Ernest T. Harer; Grace Harer; Richard W. Hanby; Pamyla Hill; D. Robin Hood; Town of Hooper; J. Richard Johnston; Marty A. Johnston; L.D. Ranch; Town of Lajara; Henry R. Lamm; Mable A.**

Lamm; John N. Lawrence; KSD, Ltd.; Lazy KV Estates Homeowners Association, Inc.; Timothy N. Lovato; Lori S. Lovato; Marold Ranches; R.G. Marold; Barbara Mertian; A & M Farms; Pamela Bertin; Phillip Briscoe; Debra Briscoe; Eddie Clayton; Wayne C. Davis; Maggi Dessain; Margarita Diaz; Melvin E. Getz; Julie Goodnight; Greg Gosar; Margaret N. Herzfield; Maggie Houston-Smith; Pamela L. Lunt; Phil Martinez; Messick Farms; Richard A. Messick; Douglas G. Messick; Richard L. Messick; Sandra J. Murray; Curtis W. Nelson; Anne Silver Philleo; Robert S. Philleo; Marlene L. Pruitt; Robert A. Ress; Toni G. Romero; Marianne Sandstrom; Robert W. Simpson; W.E. Sisemote; C. Kimberly Snider; Francis E. Snider; M. Catherine Snider; Shella Snider; Katherine Steichen; Harvey V. Sullivan; Liz Washburn; John R. Wright; George Whitten, Jr.; Donald E. Whitten; Karen Whitten; Betty L. Worley; Town of Moffat; Town of Monte Vista; Jimmy R. Moore; Mary Moore; Morfitt Brothers Farm, Inc.; Darrel Neese; Harold Neese; Gayle A. Nichols; Edward R. Oliver; Otaka International; Robert A. Owens; Edwin Pace; Howard E. Platz; Rio Grande County Commissioners; Rio Grande County Farm Bureau; Rio Grande Water Conservation District; Rio Grande Water Users Association; Rito Alto and San Luis Ranches, Inc.; Rito Alto Ranch, Inc.; Rito Alto Ranchers; Arthur L. Rivale; Ileen J. Rivale; Rocky Mountain Bison, Inc.; Thomas C. Sanderson; County of Saguache; Town of Saguache; San Luis Valley Irrigation Well Owners, Inc.; San Luis Valley Water Conservancy District; Loren R. Santisteven; Julie A. Santisteven; Neil F. Seitz;

Valley View Hot Springs; Martin T. Shellabarger; Patricia Shellabarger; Kenneth L. Skoglund; Mary F. Skoglund; Spiritual Life Institute of America, Inc.; David G. Stagner; Jeris A. Danielson, State Engineer; Steven E. Vandiver, Division Engineer; Travelers Insurance Company; Thomas F. Trim; Annabelle R. Trim; United States of America; Villa Grove Area Water Users, Owners and Opposers; Wagner Ranch, Ltd.; John H. Wagner; Weiss Ranches, Inc.; A.L. Wood; John M. Woodard; Erwin Young; Lynne Young, Objectors-Appellees.

AMERICAN WATER DEVELOPMENT, INC., a Colorado corporation,
Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT; San Luis Valley Irrigation Well Owners, Inc.; The City of Alamosa; The Town of Monte Vista; The Town of LaJara; The Town of Crestone; Saguache County; Alamosa County; Rio Grande County; Rio Grande Water Users Association; San Luis Valley Water Conservancy District; United States of America; State of Colorado; Colorado Division of Wildlife; Colorado Water Conservation Board; Jeris A. Danielson, State Engineer; Steven E. Vandiver, Division Engineer; Conejos Water Conservancy District; Oasis Land & Cattle Corp.; Oliver Powell Roemer, III, Successor Trustee Under the Trusts Under the Will of Avis Neal Roemer; Howard Platz; and Gayle Nichols, Objectors-Respondents.

**AMERICAN WATER DEV. v. CITY OF ALAMOSA**
**Cite as 874 P.2d 352 (Colo. 1994)**
TABLE OF CONTENTS

I. Procedural History and Issues Presented..... 357

II. Dismissal of the Land Grant Claims..... 360

A. Factual Background..... 360

B. The Spanish and Mexican Land Grant Claim..... 362

C. The Claim Under the Act of June 21, 1860 365

III. Challenges to the Determination that Water Sought to be Withdrawn is Tributary..... 366

A. Whether the Trial Court Properly Determined the Effect of AWDI's Proposed Pumping on Surface Streams..... 367

B. Whether the Trial Court Properly Determined the Nature of the Unconfined Aquifer and the Effect of AWDI's Proposed Pumping on that Aquifer..... 368

1. Challenge to Natural Stream Legislation as Special Legislation..... 368

2. Inclusion of Unconfined Aquifer in Definition of Natural Stream..... 371

3. Requirement of Determination of Existing Aquifer Conditions at the Time of Permit Application..... 372

C. Whether the Trial Court Properly Precluded Challenge to Means of Deversion of Closed Basin Project..... 373

IV. Procedural Prejudice..... 374

A. Whether the Trial Court's Case Management Order and its Implementation Unfarily Prejudiced AWDI..... 374

B. Whether the Trial Court's Rulings were Objective ..... 375

V. Excessive and Unwarranted Findings ..... 376

VI. Awards of Attorney Fees, Expenses, and Costs ..... 376

A. Whether AWDI can Contest the Conditions of Dismissal of the Tributary Claim..... 377

B. Whether Section 13-17-102(5) or C.R.C.P. 11 Precludes an Award of Attorney Fees and Expenses Incident to Dismissal of the Tributary Claim ..... 379

C. Whether the Special Nature of Water Adjudiciation Proceedings Prelcudes the Award of Fees and Expenses Incident to Dismissal of the Tributary Claim..... 381

D. Whether the Trial Court Employed an Incorrect Standard or Relied on Insufficient Evidence in Assessing Fees and Expenses Incident to Dismissal of the Tributary Claim..... 381

1. Correctness of Standard..... 381

2. Sufficiency of Evidence..... 383

a. Identification of Fees and Expenses Attributable to Tributary Claim ..... 383

b. Scope of Work Performed in Defense of Tributary Claim..... 385

c. Reasonableness of Amounts Charged for Fees and Expenses.. 386

3. Summary ..... 388

E. Whether Excessive Costs were Awarded Incident to Dismissal of the Nontributary Claim ..... 388

VII. Conclusion ..... 390

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Justice LOHR delivered the Opinion of the Court.

American Water Development, Inc. appeals from a judgment of the District Court for Water Division 3 denying its application with respect to water rights for the production of 200,000 acre feet of water per year by proposed wells in the San Luis Valley of Colorado and from a later judgment of that same court awarding attorney fees, expenses, and costs to certain objectors who successfully opposed the application. We consolidated these cases for all purposes on appeal[1] and now affirm both judgments.

## I. *Procedural History and Issues Presented*

On December 31, 1986, American Water Development, Inc. ("AWDI") filed an "Application For Underground Water Rights Or, In The Alternative, For The Determination Of Rights To Nontributary Groundwater

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[1] For purposes of clarity and simplicity we have listed the cases separately in the caption of this opinion.

Outside Of Designated Groundwater Basins" in the District Court for Water Division 3.[2] Statements of opposition were filed by numerous objectors.[3] After several years of discovery and motion practice, AWDI filed an amended application with leave of the court on August 31, 1990.[4] The statements of opposition to the original application were deemed to apply to the amended application, and additional statements of opposition were filed.

In the original application, AWDI sought to establish the right to withdraw 200,000 acre-feet of ground water per year from proposed wells to be located on lands owned or claimed by the applicant and containing more

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[2] The Baca Ranch Company and The Baca Corporation were co-applicants with AWDI in the original application. AWDI is the sole applicant in the amended application, referred to herein, and we make no further reference to the other applicants even when discussing the original application.

[3] The objectors who participated in the trial and are appearing on this appeal are the United States of America; the State of Colorado; Rio Grande Water Conservation District; Rio Grande Water Users Association; San Luis Valley Water Conservancy District; Conejos Water Conservancy District; Oasis Land and Cattle Company; Oliver Powell Roemer III, Trustee; Howard R. Platz; and Fred Bauder. These objectors acted in various combinations in filing and briefing motions in the trial court and in examining witnesses and presenting nontestimonial evidence during pretrial hearings and at trial. For simplicity we refer in most instances in this opinion to actions taken by "the objectors" without specifying the particular objectors or noting that others did not join.

[4] Shortly thereafter, the court permitted the substitution of an exhibit to the amended application, reflecting more current information on replacement water rights.

than 100,000 acres in the Closed Basin drainage of the San Luis Valley in south-central Colorado (sometimes, "the Valley").[5] The lands are made up of two noncontiguous parcels. The smaller parcel contains approximately 4,683 acres and is situated in the vicinity of the Town of Villa Grove in the northeastern part of the Valley. The larger parcel consists of Baca Grant No. 4 and adjacent lands, located approximately twenty miles to the south of Villa Grove. The original application proposed the use of 112 wells, 2,500 feet deep and perforated between the depths of 200 and 2,500 feet. Most of the wells were to be located on Baca Grant No. 4.

In its original application, AWDI asserted four alternative claims: (1) a claim for determination of a right to nontributary ground water pursuant to section 37-90-137(4), 15 C.R.S. (1990), subject to adjudication under section 37-92-203(1), 15 C.R.S. (1990), (2) a claim to water underlying Baca Grant No. 4 under Spanish and Mexican law and the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico, (3) a claim to water underlying Baca Grant No. 4 under the Act of June 21, 1860, Ch. 167, 12 Stat. 71 (1860), pursuant to which AWDI's predecessors acquired that tract from the United

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[5] A general description of the geographic, geologic, and hydrologic features of the San Luis Valley and of the history of water usage and the legal structure governing such usage within the Valley is set forth in *Alamosa-LaJara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 916-20 (Colo.1983). Appendix A to that case is a map of the Valley. *Id.* at 937. A description of the features of the Closed Basin appears in *Closed Basin Landowners Ass'n v. Rio Grande Water Cons. Dist.*, 734 P.2d 627, 629 (Colo.1987).

States,[6] and (4) a claim for determination of a water right for tributary ground water.

The amended application proposed implementation of pumping in phases, changed the number and location of wells (approximately 117 to be located on Baca Grant No. 4, and 15 to be located on AWDI's property near Villa Grove) and added a fifth claim pertaining to determination of injury from AWDI's proposed withdrawals and a proposal of methods to remedy any such injury by a plan for augmentation and other protective measures.

The original application indicated an intent to apply the water to various beneficial uses including agricultural use within the Valley. The amended application made clear for the first time that AWDI proposed to use some of the water outside of San Luis Valley along the Front Range within the State of Colorado.

As the case progressed, the parties attempted to narrow the issues by motions for partial summary judgment. These included a motion by the objectors to dismiss the land grant claims. On July 5, 1990, the court granted partial summary judgment dismissing those claims.

A pretrial conference was held on September 26, 1991. Near the conclusion of the pretrial conference, and without prior notice, AWDI tendered a written motion to dismiss its fourth claim – for determination of a water right for tributary ground water. The objectors argued that dismissal would prejudice them unless the dismissal

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[6] We sometimes refer to the second and third claims jointly as the land grant claims.

order included appropriate terms and conditions, including provision for payment of their attorney fees, expenses, and costs for preparing to defend against the tributary claim. At a second pretrial conference, the court granted the motion to dismiss, without prejudice, but imposed the condition that AWDI pay to the objectors their reasonable attorney fees, expenses, and costs in opposing the tributary and related claims. The court reserved determination of the amount of such award for later proceedings.

Before the second pretrial conference, the State of Colorado, one of the objectors, moved that the trial be bifurcated if the trial court should dismiss the tributary claim. By this motion, the state sought to defer consideration of issues of injury and proposed remedies, as presented by the fifth claim, until after the trial court's determination of rights to nontributary ground water. The court granted that motion to bifurcate, and the case proceeded to trial on the nontributary claim alone.

Following a trial that began on October 15 and concluded on November 22, 1991, the court denied and dismissed the application, based on its determination that the ground water that AWDI sought to withdraw is tributary to natural streams, and entered judgment accordingly. Thereafter, the court held an evidentiary hearing with respect to the costs, expenses, and attorney fees to be awarded as provided in the condition included in the earlier order dismissing the tributary claim. Based on evidence presented at that hearing, the court issued a judgment awarding ten named objectors specified amounts of attorney fees, expenses, and costs totaling $2,709,881.70. AWDI appealed each of the judgments to

this court,[7] and we granted a motion to consolidate the cases for all purposes.

In this appeal, AWDI assigns the following errors, as set forth in its briefs in the sequence here presented: (1) the trial court's case management order and its implementation prejudiced AWDI, and the trial court's rulings were not objective; (2) the trial court erred in its order awarding fees and costs under C.R.C.P. 41(a)(2) and 54(d); (3) the trial court erred in its pretrial partial summary judgment rulings (a) dismissing the land grant claims, (b) precluding examination of the Closed Basin Project's[8] means of diversion, and (c) holding that legislation classifying certain stream systems as natural streams subject to appropriation did not violate the prohibition of special legislation under Article V, Section 25, of the Colorado Constitution; (4) the trial court erred in rejecting AWDI's claim for determination of a right to nontributary ground water; (5) the trial court failed to identify relevant existing aquifer conditions; and (6) the

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[7] We have jurisdiction over these cases by virtue of Colo. Const. art VI, § 2, and § 13-4-102(1)(d), 6A C.R.S. (1987), which statutorily excludes from the court of appeals' jurisdiction appeals from final judgments of district courts in "[w]ater cases involving priorities or adjudications." *See also* C.A.R. 1(a)(2).

AWDI is designated as Applicant-*Petitioner* in case no. 92SA263, involving the judgment for attorney fees, expenses, and costs, because it filed a notice of appeal in the Colorado Court of Appeals as well as in this court and asked that we accept certiorari under C.A.R. 50 in the event that we deemed the court of appeals to have jurisdiction over the appeal. We accepted jurisdiction on direct appeal.

[8] *See infra* at 372-373.

trial court incorporated excessive and unwarranted findings in its order dismissing AWDI's amended application.

We first address the challenged partial summary judgment rulings on the land grant claims (Issue 3(a)), then the combination of issues concerning rejection of AWDI's nontributary ground water right claim (Issues 3(b) and (c), 4, and 5), next the issues concerning the case management order and the objectivity of the trial court's rulings (Issue 1), then whether the trial court's findings were excessive and unwarranted (Issue 6), and finally the challenge to the award of attorney fees, expenses, and costs (Issue 2).

## II. *Dismissal of the Land Grant Claims*

The trial court granted the objectors' motions for partial summary judgment dismissing AWDI's claims of rights to ground water based on Spanish and Mexican law as recognized and affirmed by the United States or, in the alternative, on an absolute grant of title by the United States.[9] These claims, in essence, are that by reason of the manner in which AWDI's predecessor obtained title to Baca Grant No. 4, all right to underground water, whether tributary or not, underlying that tract were acquired by the original grantee and were later conveyed to AWDI.

Standards governing appropriateness of summary judgment are well settled. Where there is no genuine

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[9] These claims relate only to Baca Grant No. 4 and do not apply to the adjacent lands or to the smaller parcel in the vicinity of Villa Grove.

issue of any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is warranted. C.R.C.P. 56; *Greenberg v. Perkins*, 845 P.2d 530, 531 (Colo.1993); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo.1988); *Pueblo W. Metro. Dist. v. S.E. Colo. Water Cons. Dist.*, 689 P.2d 594, 600 (Colo.1984). It is the burden of the moving party to demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. *Greenberg*, 845 P.2d at 531; *Elm Distrib., Inc. v. Tri-Centennial Corp.*, 768 P.2d 215, 218 (Colo.1989). Although the party resisting summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the facts presented, the moving party's request must be granted where the facts are undisputed and the opposing party cannot prevail as a matter of law. *Greenberg*, 845 P.2d at 531; *see Kaiser Foundation Health Plan of Colo. v. Sharp*, 741 P.2d 714, 719 (Colo.1987).

Applying these principles to the present case, we conclude that the record demonstrates that there is no genuine issue of material fact. The facts concerning the manner in which title passed into private ownership are undisputed. It is only the legal effect of the relevant events and documents that is at issue. Our task, therefore, is to determine whether the record supports the entry of partial summary judgment in favor of the objectors as a matter of law. We begin by presenting the salient facts that formed the basis of the trial court's decision.

A. *Factual Background*

In 1821, Luis Maria Cabeza de Baca, on behalf of himself and a number of his male children, petitioned Mexican governmental authorities for the grant of a tract of land containing nearly 500,000 acres[10] and known as the Vegas Grandes in the vicinity of the present day city of Las Vegas, New Mexico. H.R.Exec.Doc. No. 14, 36th Cong., 1st Sess. at 3 (1860) (hereinafter, "H.R.Exec.Doc. No. 14"). The tract was granted to Baca,[11] who settled on the land, remained for some time, and then left. *See id.* at 3-4. In 1835, certain other persons petitioned Mexican governmental authorities for the same land, and the petition was granted shortly thereafter with the proviso that persons who owned no land were to be permitted the same privilege of settling upon the grant as the persons who had petitioned. *Id.* at 44. Thereafter, several hundred families settled on the grant. *See* S.Rep. No. 228, 36th Cong., 1st Sess. at 3 (1860) (hereinafter, "S.Rep. No. 228").

In 1848, the United States and the Republic of Mexico entered into the Treaty of Guadalupe Hidalgo, ending hostilities between the two nations. Treaty of Peace, Friendship, Limits, and Settlement With The Republic of Mexico, Feb. 2, 1848, U.S. – Mex., 9 Stat. 922. Under

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[10] *See Lane v. Watts*, 234 U.S. 525, 527, 34 S.Ct. 965, 967, 58 L.Ed. 1440 (1914).

[11] Mexico achieved independence from Spain in 1821. *See* Henry B. Parkes, *A History of Mexico* 170-72 (Houghton Mifflin 1988). The grant to Baca was made by the provincial deputation of Durango on May 29, 1821, and was later ratified and confirmed in February 1825 by the departmental assembly of New Mexico, then a province of the Republic of Mexico. *See* S.Rep. No. 228, 36th Cong., 1st Sess. at 3 (1860).

Article V of the treaty, Mexico ceded certain lands to the United States. 9 Stat. at 926-28. Included within them was the Vegas Grandes. Article VIII of the treaty required the United States to respect the property of Mexican citizens in the ceded lands. 9 Stat. at 929-30.[12]

In order to establish a process for determination of land claims within the portion of the ceded lands relevant here, Congress passed the Act of July 22, 1854, Ch. 103, 10 Stat. 308 (1854). Pursuant to that act, the surveyor general of the Territory of New Mexico, within which the Vegas Grandes was situated, was given the duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico" and to report to Congress on the validity of such claims so that Congress could take "such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico. . . . " *Id.* § 8 at 309. On December 18, 1858, the surveyor general issued his report with respect to the claims of the heirs of Baca and of the town of Las Vegas to the Vegas Grandes. He concluded

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[12] Article VIII of the treaty of Guadalupe Hidalgo provided, in relevant part:

> In [the territory in question], property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

9 Stat. at 929-30.

> that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

H.R. Exec.Doc. No. 14 at 45.

On May 19, 1860, the United States Senate Committee on Private Land Claims issued its report. It determined that the grant to Baca and his sons "is a genuine and valid title," and that later, on a petition that represented the land to be public, the same land was granted to the predecessors of the town of Las Vegas, the persons presenting the petition were put in possession, "and several hundred families are located on it." S.Rep. No. 228 at 3. The report noted that the surveyor general "has recommended the confirmation of both these titles, leaving to the respective claimants the right of adjusting their conflicting claims in the courts." *Id.* at 3-4. The report observed, however, that "the plunging of an entire settlement of families into litigation, at the imminent hazard of being turned out of their homes, or made to purchase a second time, from a private owner, lands for which they paid their government a full equivalent, in the labor, risk, and exposure by which they have converted a wilderness, surrounded by hostile savages, into a civilized and thriving settlement" would be a disastrous result. *Id.* at 4. It

then stated that an alternative involving "little loss or cost to the government," *id.*, was available:

> The claimants under the title to Baca, . . . represented by . . . counsel, have expressed a willingness to waive their older title in favor of the settlers, if allowed to enter an equivalent quantity of land elsewhere within the Territory; and your committee cannot doubt that Congress will cheerfully accept the proposal, which, indeed, would undoubtedly have been acceded to by Mexico if the Territory had remained hers, and to whose rights and duties the United States have succeeded.

*Id.*

Congress acted by adopting the Act of June 21, 1860, Ch. 167, 12 Stat. 71 (1860), confirming, among others, claim number 20, which embraced the competing claims of the Baca heirs and the town of Las Vegas[13] to the Vegas

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[13] The competing claims were included within claim 20 in the surveyor general's report. Claim 20 was among the claims confirmed, "as recommended for confirmation by said surveyor-general in his reports," by section 3 of the Act of June 21, 1860. We use the term "confirmed" with respect to each of these competing claims even though Congress clearly recognized the conflict between them and provided a means for its resolution. Congress undoubtedly meant no more than to acknowledge and approve the surveyor general's conclusion that in the absence of either claim the other would be a good and valid grant. *See* Senate Rep. No. 228 at 3-4. ("The surveyor general having none but ministerial duties to perform, has recommended the confirmation of both these titles, leaving to the respective claimants the right of adjusting their conflicting claims in the courts."); *see also Lane v. Watts*, 234 U.S. at 528, 34 S.Ct. at 968 (referring to both grants as "confirmed"); *but see*

Grandes, and making the following provision for the heirs of Baca:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas [sic], to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however,* That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Act of June 21, 1860, § 6, 12 Stat. 71, 72 (1860). As the United States Supreme Court characterized it, "Congress accommodated the dispute by a magnificent donation of lands to the heirs of Baca, and confirmed the original land to the town. . . . " *Maese v. Herman,* 183 U.S. 572, 581, 22 S.Ct. 91, 95, 46 L.Ed. 335 (1902).[14] Such a determination

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*Shaw v. Kellogg,* 170 U.S. 312, 342, 18 S.Ct. 632, 644, 42 L.Ed. 1050 (1898) (speaking of the claim of the heirs of Baca to the Vegas Grandes, the court said, "Here there had been no claim confirmed to any tract of land but only the grant of a right to locate.")

[14] In *Maese,* the United States Supreme Court further noted, [W]e can easily see that Congress might have exercised its bounty to adjust a controversy to which a town was a party,

and resolution of claims arising under a treaty was within the province of Congress. *See United States v. Sandoval*, 167 U.S. 278, 290, 17 S.Ct. 868, 872-73, 42 L.Ed. 168 (1897); *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 661, 23 L.Ed. 998 (1876); *Sanchez v. Taylor*, 377 F.2d 733, 737 (10th Cir.1967).

What followed is detailed in *Shaw v. Kellogg*, 170 U.S. 312, 18 S.Ct. 632, 42 L.Ed. 1050 (1898). The surveyor general of the Territory of New Mexico was directed by proper federal authority to survey the Vegas Grandes to determine the area of the grant, whereupon the Baca heirs would have the right to select an equal quantity of vacant, nonmineral land in the Territory of New Mexico in square parcels not to exceed five. *Id.* at 314, 18 S.Ct. at 633. The Baca heirs selected the Baca Grant No. 4 as one of the parcels. *Id.* at 315, 18 S.Ct. at 633-34. Prior to such selection, the Territory of Colorado had been organized, Act of February 28, 1861, ch. 59, 12 Stat. 172 (1861), and the area embraced within Baca Grant No. 4 was included within the boundaries of the newly formed territory. *See Shaw*, 170 U.S. at 316, 18 S.Ct. at 634. Following investigation and survey, the Colorado surveyor general approved the field notes, survey, and plat of Baca Grant No. 4. *See id.* at 314-25, 18 S.Ct. at 633-38. Upon such approval, in 1864 title passed pursuant to the Act of June 21, 1860, without the necessity for issuance of a patent. *Id.* at 342-43, 18 S.Ct. at 644-45. AWDI must predicate its land

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when, if the contestants were individuals, they would have been remitted to the courts to litigate their rights and priorities. *Maese*, 183 U.S. at 581, 22 S.Ct. at 95.

grant claims on the foregoing facts. We now turn to an analysis of those claims.

B. *The Spanish and Mexican Land Grant Claim*

AWDI first asserts that its title to Baca Grant No. 4 is derived from a Spanish or Mexican grant[15] and has all the attributes of such a grant, allegedly including transfer of all underground water, whether tributary or nontributary, underlying the granted lands. AWDI asserts that recognition of the Spanish or Mexican origin of its title is necessary in order to honor the requirement of the Treaty of Guadalupe Hidalgo that the United States respect the property rights of Mexican citizens.

"[I]ndividual rights of property, in the territory acquired by the United States from Mexico, were not affected by the change of sovereignty and jurisdiction." *Tameling*, 93 U.S. at 661. "The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed, was within the appropriate province of the political department of the government." *Id.* Congress provided the necessary procedures by adopting the Act of July 22, 1854. Congress committed to the surveyor general of the Territory of New Mexico the duty of ascertaining the origin, nature, character and

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[15] As previously noted, Mexico achieved independence from Spain in 1821. That was the year in which Baca petitioned for the grant of Vegas Grandes. It is unimportant to the resolution of the issues before us whether title to Vegas Grandes was derived under Spanish law, Mexican law, or some combination of the two.

extent and determining the validity of all such claims in the Territory. *Tameling*, 93 U.S. at 662. The final action on each claim was reserved to Congress and not subject to judicial review. *Id.*

The land comprising Baca Grant No. 4 was never in the private domain before it was granted to the Baca heirs pursuant to the Act of June 21, 1860. It was in territory under the sovereignty of Spain and then the Republic of Mexico prior to the Treaty of Guadalupe Hidalgo. Under that treaty the United States acquired sovereignty and the land became part of the public domain.[16] In order to resolve amicably the disputed claims to the Vegas Grandes, which was a completely different tract located in what is now the State of New Mexico, the Baca heirs, one of two sets of claimants to that latter tract, offered to "waive their older title in favor of" the other group of claimants "if allowed to enter an equivalent quantity of land elsewhere within the Territory." S.Rep. No. 228 at 4.[17] The Act of June 21, 1860, followed, in which the

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[16] In *Ely Real Estate & Investment Co. v. Watts*, 262 F. 721, 721 (9th Cir.1920), *cert. denied*, 255 U.S. 564, 41 S.Ct. 374, 65 L.Ed. 788 (1921), the court referred to the effect of the Act of June 21, 1860, as "granting to the heirs of Luis Maria Cabeza de Baca the right to select lands *in the public domain* in lieu of the Las Vegas grant, which they claimed to own." (Emphasis added). *See Lane v. Watts*, 234 U.S. at 539-40, 34 S.Ct. at 972 (Baca Grant No. 3 was segregated from public domain); *Kellogg*, 170 U.S. at 338, 343, 18 S.Ct. at 643, 645 (Baca Grant No. 4 was segregated from public domain).

[17] *See Lane v. Watts*, 234 U.S. at 541-42, 34 S.Ct. at 973 ("To accommodate conflicting claims and at the instance of the Government the Baca claimants gave up their rights to a definite tract of land, and . . . the Government therefore would naturally

United States Congress accepted the offer of the heirs of Baca and allowed them "to select instead of the land claimed by them, an equal quantity of vacant land,[18] not mineral, in the Territory of New Mexico." The heirs of Baca did select such land, part of which was Baca Grant No. 4, and obtained title from the United States by following the procedures prescribed by the Act of June 21, 1860. The result was a grant of lands in which no private rights had ever been recognized under the laws of Spain or Mexico and a waiver of a claim to other lands under which such rights could have been asserted by the claimants. *See Wise v. Watts*, 239 F. 207, 225-27 (9th Cir.1917), *cert. denied*, 244 U.S. 661, 37 S.Ct. 745, 61 L.Ed. 1376 (1917) (discussing title to Baca Grant No. 3, obtained under the same circumstances as Baca Grant No. 4).

The grant of lands, including Baca Grant No. 4, not subject to rights under the laws of Spain and Mexico in return for such waiver was not an abrogation of treaty rights as AWDI contends, but rather a resolution of competing claims well within the ambit of congressional authority. *See Sandoval*, 167 U.S. at 290, 17 S.Ct. at 873 ("The mode in which private rights of property may be secured, and the obligations imposed upon the United States, by treaties, fulfilled, belongs to the political

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make provision for the location of the substituted land as expeditiously as possible and without expense to the Baca heirs").

[18] "Vacant land" necessarily referred to land not subject to "claims to lands under the laws, usages, and customs of Spain and Mexico," for lands in the latter category previously had been withdrawn from disposal pending final action by Congress on such claims. Act of July 22, 1854, § 8, 10 Stat. at 308, 309.

department of the government to provide."); *Tameling*, 93 U.S. at 661. The Act of June 21, 1860, itself contains no suggestion that the grant of Baca Grant No. 4 involved any intent to create rights other than those incident to any conveyance of lands from the public domain of the United States to a private citizen. *Cf. United States v. Roselius*, 56 U.S. (15 How.) 31, 34, 14 L.Ed. 587 (1853) (confirmation of doubtful claim by Congress on certain terms and acceptance of those terms by claimant adjusts the claim on the footing of compromise and forecloses judicial review).

AWDI argues, however, that references by Congress to "confirmation" of the claim of the Baca heirs to the Vegas Grandes reflect an intent that the rights acquired by the Baca heirs in the substituted lands, including Baca Grant No. 4, were the same rights incident to their claim under Spanish or Mexican law to the Vegas Grandes. This argument is not well taken. The surveyor general of the United States did indeed recommend that the title of the Baca heirs to the Vegas Grandes be confirmed and the disputes between the two sets of claimants be resolved in court. Instead, however, pursuant to agreement, the Baca heirs waived that title in return for the right to obtain other lands from the United States. The surveyor general's recommended confirmation of the original title and Congress's ensuing confirmation of claim 20 both related to rights in the Vegas Grandes but suggested nothing about the nature of the title to be acquired from the

United States by a compromise grant of other lands in that sovereign's public domain.[19]

AWDI also relies on case authority to support its argument that title to the alternative selected lands does not lose its original character as derived under the laws of Spain or Mexico. AWDI refres us to *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255, 21 L.Ed. 835 *Board of County Comm'rs of County of Pueblo v. Central Colo. Improvement Co.*, 2 Colo. 628 (1874) (*Nolan I*); *rev'd by Central Colo. Improvement Co. v. Board of Comm'rs*, 95 U.S. 259, 24 L.Ed. 495 (1877) (*Nolan II*). *Henshaw* referred to Mexican law in part to determine the better title under conflicting United States patents issued upon a confirmation of grants made by the Mexican government as floating grants within a general tract large enough to satisfy both. *Nolan I* and *Nolan II* establish that when a Mexican land grant is

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[19] AWDI in its reply brief in this court also refers to the use of the term "confirmation" in the Act of June 11, 1864, Ch. 123, 13 Stat. 125 (1864), which provides for selection of substitute lands by the Baca heirs for one of the parcels selected by them under the Act of June 21, 1860. The Act of June 11, 1864, refers to the lands first selected by the Baca heirs as "bodies of land confirmed to them" by the 1860 act, then refers to one of the substitute parcels as "confirmed to said heirs as aforesaid," and finally refers to the selection of substitute lands under the Act of June 11, 1864, as "confirmed to the said heirs of the said Luis Maria Baca." AWDI argues that the language of confirmation supports its argument that title to the substitute tracts is derived under Spanish or Mexican law. As previously noted, however, it was the claim of the Baca heirs to the Vegas Grandes that was confirmed, and that claim was waived in order to resolve a conflicting claim by the Town of Las Vegas. We are unable to ascribe to the general references to confirmation in the Act of June 11, 1864, the significance attached to them by AWDI.

confirmed to less than all of the lands located within the boundaries of the original grant, title relates back to and is grounded upon the laws of Mexico. In the present case, the claim confirmed to the Baca heirs was their claim to the Vegas Grandes. The Baca heirs waived that claim and accepted a grant from the United States to public domain lands not within the boundaries of any Mexican land grant. Neither *Henshaw* nor the opinions in *Nolan I* and *Nolan II* speak to this issue. For the reasons previously expressed, we hold that title to the Baca Grant No. 4 did not derive from the Mexican government or its Spanish predecessor.[20]

C. *The Claim Under the Act of June 21, 1860*

AWDI asserts a supplemental or alternative claim to ownership of all ground water underlying Baca Grant

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[20] AWDI also notes that "Baca Location No. 1," one of the five parcels selected by the Baca heirs under the Act of June 21, 1860, was referred to as a "Spanish Land Grant" in House and Senate reports concerning legislation on land exchanges in 1990. *See* H.R.Rep. No. 783, 101st Cong., 2d Sess., pt. 1, at 3 (1990), Legislative History of Baca Location No. 1 Land Acquisition and Study Act of 1990, Pub.L. No. 101-556, 104 Stat. 2762 (1990). Certainly, rights to the parcels selected by the Baca heirs arose indirectly from Spanish or Mexican land grants for the Vegas Grandes and the resolution of conflicting claims to the Vegas Grandes under such grants. Under these circumstances we attach no weighty significance to the references to "Baca Location No. 1" as a Spanish Land Grant in the legislative reports.

Furthermore, because title to the Baca Grant No. 4 is not based on confirmation of a Spanish or Mexican grant of such lands, we need not and do not express any opinion on the incidents of title that is so based.

No. 4 based on the language of the Act of June 21, 1860. As earlier discussed, section 3 of that Act "confirmed" certain private land claims in the Territory of New Mexico, including the competing claims of the Baca heirs and the Town of Las Vegas to the Vegas Grandes, as recommended for confirmation by the surveyor general. In section 4 of the Act, Congress provided "[t]hat the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." AWDI relies on this language of quit claim or relinquishment as conveying to the Baca heirs all rights of the United States in the lands selected by them in return for waiver of their claim to the Vegas Grandes. Such rights, according to this argument, included all rights to water underlying Baca Grant No. 4.

As earlier noted, however, the Act of June 21, 1860, did not confirm a claim of the Baca heirs to Baca Grant No. 4. They had no such claim. Instead, pursuant to section 6 of that Act and the legislation previously discussed, the Baca heirs were authorized to select alternative lands not within the boundary of the Vegas Grandes in return for waiver of their claim to the Vegas Grandes. Section 4 of the Act, quit claiming or relinquishing rights of the United States to confirmed claims, had no application to the substitute lands. AWDI's reliance on *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255, 21 L.Ed. 835 (1873), and language in *Shaw v. Kellogg*, 170 U.S. 312, 331, 18 S.Ct. 632, 640, 42 L.Ed. 1050 (1898), is misplaced. Those cases contain language supporting the proposition that confirmation of claims under the Act of June 21, 1860, effected relinquishment of all rights of the United States to the

premises covered by the claims. This proposition, based on section 4 of the Act, has no application to the substitute lands in the public domain, including Baca Grant No. 4, selected by the Baca heirs in return for waiver of their claim to the Vegas Grandes, the tract to which their claim pertained.

Principles of construction militate against AWDI's arguments as well. Land grants are construed favorably to the United States government, and nothing passes except what is conveyed in clear and explicit language. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59, 103 S.Ct. 2218, 2231, 76 L.Ed.2d 400 (1983) (lands acquired under Stock Raising Homestead Act of 1916 do not include gravel deposits); *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 617, 98 S.Ct. 2002, 2009-10, 56 L.Ed.2d 570 (1978) (water is not a valuable mineral subject to location under Federal Mining Law of 1872); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S.Ct. 685, 687, 1 L.Ed.2d 693 (1957) (right of way granted to railroad did not include mineral rights); *Caldwell v. United States*, 250 U.S. 14, 20-21, 39 S.Ct. 397, 398-99, 63 L.Ed. 816 (1919) (right granted by statute to railroad to take timber necessary for construction did not extend to "tie slash" – tops of trees not usable for making ties). Any doubts are to be resolved in favor of the government and not against it, *Western Nuclear, Inc.*, 462 U.S. at 59, 103 S.Ct. at 2231; *Andrus*, 436 U.S. at 617, 98 S.Ct. at 2009-10; *United States v. Union Pac.*, 353 U.S. at 116, 77 S.Ct. at 687; *Caldwell*, 250 U.S. at 20-21, 39 S.Ct. at 398-99, as are any inferences, *Caldwell*, 250 U.S. at 20, 39 S.Ct. at 398. The rule of narrow construction of federal land grants has been applied with particular vigor with respect to water where determination that a grant

carries rights to water would create inconsistencies with the water right system that has been based on local law and custom. *See Andrus*, 436 U.S. at 615-17, 98 S.Ct. at 2008-10.[21]

Nothing in the Act of June 21, 1860, suggests that the land to be received by the Baca heirs by selection from the public domain in exchange for relinquishment of their claim under Spanish or Mexican law to the Vegas Grandes was to have any incidents peculiar to claims

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[21] AWDI contends that local law and custom governed the extent of water rights appurtenant to lands conveyed by the United States when the Baca heirs obtained title to Baca Grant No. 4 in 1864. *See generally California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-55, 55 S.Ct. 725, 727-28, 79 L.Ed. 1356 (1935); *State v. S.W. Colo. Water Cons. Dist.*, 671 P.2d 1294, 1304-07 (Colo. 1983) *cert. denied, Young v. S.W. Colo. Water Cons. Dist.*, 466 U.S. 944, 104 S.Ct. 1929, 80 L.Ed.2d 474 (1984). AWDI argues that local law and custom in the San Luis Valley at the relevant time presents a genuine issue of material fact precluding summary judgment. As we recognized in *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446 (1882), however, the doctrine of priority of appropriation with respect to tributary water governed in Colorado "from the date of the earliest appropriations of water within the boundaries of the state."

We believe that at least after Colorado was organized as a territory on February 28, 1861, the proper inquiry concerning local law and custom is to be made on a territory-wide basis. The use of the term "law" indicates that we should look to the body empowered to make law – here the territorial legislature – and suggests that "custom" should be examined within that same territorial compass. *Coffin* therefore controls, and we find it unnecessary to inquire into the possibility of differing custom in particular parts of the territory or state.

derived under the law of those sovereigns. The Act contains no mention whatsoever of rights to water underlying the lands to be selected.[22] There is no basis in the Act of June 21, 1860, to support a construction that the baca heirs acquired any rights that would have been recognized under Spanish or Mexican law to substituted lands selected by them in return for waiver of their claim to the Vegas Grandes.[23]

We hold that AWDI's argument that it acquired rights to water underlying Baca Grant No. 4 based on the terms of the Act of June 21, 1860, is not well founded.

III. *Challenges to the Determination that Water Sought to be Withdrawn is Tributary*

At the time of trial, AWDI's sole remaining claim for a right to withdraw 200,000 acre feet of water annually from wells on lands owned or claimed by it was contained in that part of its amended application seeking a determination of rights to nontributary ground water under section 37-92-203(1), 15 C.R.S. (1990). The trial

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[22] For general principles concerning the interrelation of federal and state law concerning acquisition of rights to water, *see, e.g., S.W. Colo. Water cons. Dist.*, 671 P.2d at 1304-18; *United States v. City and County of Denver*, 656 P.2d 1 (Colo.1983); *Coffin*, 6 Colo. 443.

[23] For the foregoing reasons, we also are unpersuaded by AWDI's suggestion that by reason of the obligations of the United States under the Treaty of Guadalupe Hidalgo and by an attempted analogy to the doctrine of federal reserved water rights, *see United States v. City and County of Denver*, 656 P.2d 1, the Baca heirs were granted by implication a right to water underlying Baca Grant No. 4.

court determined that the water did not meet the statutory definition of nontributary ground water in section 37-90-103(10.5), 15 C.R.S. (1990), and therefore denied the claim. The court found that the water was tributary not by a mere preponderance of the evidence but "beyond a reasonable doubt."[24]

Section 37-90-103(10.5) defines nontributary ground water, in relevant part, as follows:

> 'Nontributary Ground Water' means that ground water, located outside that boundaries of any designated ground water basins[25] in existence on January 1, 1985, the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101(2) and 37-92-102(1)(b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal. The determination of whether ground water is nontributary shall be based on aquifer conditions existing at the time of permit application. . . .

Based on this definition, the water sought by AWDI was nontributary ground water only if within one hundred years the withdrawal at the rate of 200,000 acre feet per year would not deplete the flow of a natural stream at an annual rate of one-tenth of one percent of that amount, or

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[24] The state engineer had issued a determination pursuant to § 37-92-302(2), 15 C.R.S. (1993 Supp.), that the water was tributary, and the trial court took note of the rebuttable presumption created by that determination. *See* § 37-92-305(6), 15 C.R.S. (1993 Supp.).

[25] The ground water at issue is located outside the boundary of any designated ground water basins.

200 acre feet per annum. The trial court found that the effect of the withdrawals on three sets of natural streams would exceed the statutory standard. First, the court found that depletion to the surface flows of the Rio Grande River and San Luis Creek alone would be approximately 7,400 acre feet per annum. Second, the court found that depletions of approximately 3,600 acre feet per annum would result to the surface flow of Big Spring Creek and that depletions to many other streams in the Closed Basin would occur in amounts not quantified by the evidence. Additionally, the trial court found that there would also be depletions to the Closed basin's unconfined aquifer, which the court concluded to be part of the water of a natural stream. We first address the findings concerning the effect of AWDI's proposed pumping on surface streams and then the issues relating to the effect on the unconfined aquifer.[26] We conclude this section by

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[26] AWDI's theory of nontributariness was premised principally on several related contentions, all of which were properly rejected by the trial court. First, it argued that whether ground water is nontributary is to be determined solely by reference to the effect of pumping on the surface flow of natural streams without regard to the effect on ground water tributary to such streams. Second, it contended that there was no significant hydraulic connection between the surface streams in the Closed Basin and the underlying aquifers so that depletion of the unconfined aquifer would not deplete the surface flow or cause greater loss through streambed leakage than would otherwise occur. AWDI also contended that the streams in the Closed Basin lose their character as natural streams when they reach the Closed Basin. As discussed herein, the trial court rejected these premises based on determinations of fact from conflicting evidence, correct rulings on the law, or a combination of the two.

considering AWDI's challenge to the partial summary judgment order precluding it from challenging the means of diversion of the Closed Basin Project.

A. *Whether the Trial Court Properly Determined the Effect of AWDI's Proposed Pumping on Surface Streams*

The trial court's determinations of the effects of the proposed withdrawals on the Rio Grande River, San Luis Creek, Big Spring Creek, and other surface streams are findings of fact. As such, they will not be disturbed on appeal unless wholly unsupported by the evidence. *Board of County Comm'rs v. Upper Gunnison River Water Cons. Dist.*, 838 P.2d 840, 847 (Colo.1992); *People v. City of Thornton*, 775 P.2d 11, 19 (Colo.1989).

The trial court was presented with extensive evidence, through expert testimony and voluminous exhibits, concerning the geological and hydrologic characteristics of the Valley and of the Closed Basin in particular. The evidence established, and the trial court found, that underlying the lands in the Valley are two aquifers having different hydrologic properties and generally acting as separate hydrologic units. Separating them is a group of clay layers referred to as the blue clay series. The upper aquifer, called the unconfined aquifer, consists of coarse materials with relatively high hydraulic conductivities, and is situated above the blue clays, which range in depth from 35 feet on the west side of the Valley to 125 feet on the east. Most of the irrigation wells in the Valley

are completed in this aquifer.[27] The lower aquifer is located below the blue clays. Although hydrologically connected at various points, the two aquifers have been separately administered by the state engineer for well permit purposes. The extent of the hydraulic connection is sufficiently slight that water in the confined aquifer is maintained under artesian pressure. The artesian condition results from a recharge of the confined aquifer by waters entering the aquifer at higher elevations at the edges of the Valley and the limited permeability of the blue clays separating the two aquifers.

The evidence concerning the effects to be produced by AWDI's proposed withdrawals of water was sharply conflicting in many respects. Each side attempted to develop a comprehensive geologic and hydrologic framework for use in predicting the movement of water within the San Luis Valley as a result of such withdrawals. For this purpose AWDI and the objectors utilized complex ground water flow computer models, the objectors' model having been developed by the Colorado state engineer. By introducing into the models certain data as described to the court through expert testimony, each side attempted to demonstrate the effect of the proposed withdrawals on surface streams and the unconfined aquifer.

In general, the court found the evidence presented by the objectors had utilized in operating their computer

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[27] AWDI's proposed wells are to be perforated at depths between 200 and 2,500 feet and therefore are to be completed in the lower, confined aquifer.

model more credible than that of AWDI.[28] In particular, the court made the critical finding that the ground water in the unconfined aquifer "is in hydraulic connection with most surface streams in the San Luis Valley and their alluvium for all or portions of most years."[29] As a result, the level of the water table in the unconfined aquifer influences gain or loss to the streams. On another critical factual issue, the trial court found that the values used by AWDI for streambed conductance, which expresses the rate at which a stream will lose water to the underlying aquifer, were not credible; AWDI's data greatly underestimated loss of water through streambed leakage. The court also found that AWDI's evapotranspiration data and use of that data in its computer model materially overstated the potential for reducing loss of water by evapotranspiration by lowering the water table through pumping and thus eliminating vegetation. These are examples of some of the more important factual findings that undermined the credibility of the results predicted by the use of AWDI's computer model.

The trial court also found that the State's model was originally created for administrative purposes and was "far more extensive and thorough" than that of AWDI. The court found that while not purporting to be able "to

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[28] After an extensive review of the evidence concerning AWDI's computer model and the data used in operating it the trial court found "that the opinions of [AWDI's] experts, based upon its model, are not credible."

[29] AWDI acknowledges that there is a hydraulic connection between the surface streams and the unconfined aquifer with respect to the property near Villa Grove. The issue here relates only to the Baca Grant No. 4 and adjacent lands.

predict with exact precision the quantity and location of stream depletions" to be caused by AWDI's proposed pumping, the State's model was adequate for a determination of whether depletion to certain streams would exceed the statutory standard in the definition of nontributary water. The 7,400 acre feet per annum depletive effect on the Rio Grande River and San Luis Creek was directly predicted by the State's model and provided the basis for the trial court's finding that this effect was inconsistent with the statutory definition of nontributary water.

In addition, the State's model predicted the locations where the water level in the unconfined aquifer would be drawn down by AWDI's proposed pumping. Based on expert testimony that Big Spring Creek was in hydraulic connection with the unconfined aquifer, the computer model prediction that the effect of AWDI's proposed pumping would reduce the water level in that aquifer to a particular extent, and an expert's testimony concerning the effect of such a water level reduction on Big Spring Creek, the trial court found that the creek would be depleted by approximately 3,600 acre feet per year by the proposed pumping, a reduction in itself sufficient to defeat AWDI's claim that the water it sought to withdraw was nontributary. The trial court also found that the lowering of the water level in the unconfined aquifer would adversely affect other natural streams even though such effects could not be precisely quantified because those streams were not included in the computer model.

All of the trial court's findings were based on evidence in the record and will not be overturned. *See, e.g., Upper Gunnison River,* 838 P.2d at 847.

B. *Whether the Trial Court Properly Determined the Nature of the Unconfined Aquifer and the Effect of AWDI's Proposed Pumping on that Aquifer*

The trial court also determined that the unconfined aquifer was part of a natural stream, with the result that the depletive effects of AWDI's proposed withdrawals on that aquifer must be taken into account as well in determining whether the water to be withdrawn is nontributary. We agree.

Under Article XVI, Sections 5 and 6, of the Colorado Constitution, the water of every natural stream is declared to be the property of the public and subject to appropriation for beneficial use. The manner of implementation of that right has been delineated by the Water Right Determination and Administration Act of 1969, §§ 37-92-101 to -602, 15 C.R.S. (1990 & 1993 Supp.), and extensive case law preceding and following that Act. The right to appropriate water of every natural stream extends to waters tributary to a natural surface stream. § 37-92-102, 15 C.R.S. (1990); *State v. S.W. Colo. Water Cons. Dist.*, 671 P.2d 1294, 1308 (Colo.1983); *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963).

Nontributary ground water is subject to disposition by the General Assembly in exercise of its plenary power to develop a system of law governing acquisition of rights in this resource. *See S.W. Colo. Water Cons. Dist.*, 671 P.2d at 1304-18 (describing interrelation of federal and state law concerning the acquisition of rights to water). In exercise of that power, the General Assembly has provided for judicial determination of rights to nontributary ground water outside of designated ground

water basins, § 37-92-203(1), 15 C.R.S. (1990), and has established standards and procedures concerning acquisition of such rights, § 37-90-137, 15 C.R.S. (1990 & 1993 Supp.). The right to withdraw nontributary ground water is based on ownership of the overlying land, § 37-90-102(2), 15 C.R.S. (1990); § 37-90-137(4), 15 C.R.S. (1990 & 1993 Supp.), rather than the doctrine of prior appropriation applicable to tributary water.

Because of the two separate systems for acquisition of rights in water in and tributary to natural streams and nontributary ground water it became useful to define the distinction between these two resources. The present case implicates two sets of statutes establishing that distinction. The one is a pair of statutes having particular application to stream systems arising and terminating in Colorado. The other is the statute defining "nontributary ground water."

In 1979, the General Assembly enacted essentially identical statutes,[30] as set forth in Ch. 346, secs. 1, 4, § 37-82-101(2), § 37-92-102(1)(b), 1979 Colo.Sess.Laws 1366, 1366, 1367-68, which provide:

> A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation

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[30] The only difference is that § 37-82-101(2) concludes by reference to "appropriation as provided in subsection (1) of this section," whereas § 37-92-102(1)(b) concludes by reference to "appropriation as provided in paragraph (a) of this subsection (1)." Each of the subsections to which reference is made in turn makes reference to the constitutional right of appropriation, although the language of the subsections is not identical.

> and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation. . . .

We sometimes refer to sections 37-82-101(2) and 37-92-102(1)(b) collectively as the "natural surface stream legislation."

In 1985, the General Assembly adopted the definition of nontributary ground water in effect at the time AWDI asserted its claim and continuing to the present. § 37-90-103(10.5), 15 C.R.S. (1990). That statute appears earlier in this opinion at page 34 and specifically includes the natural streams defined in the natural surface stream legislation among the natural streams to be considered in applying the statutory test.

Relying on the definition of "natural surface stream" adopted in the natural surface stream legislation, which includes underflow and tributary waters, the trial court found the streams flowing into the Closed Basin and the unconfined aquifer into which those streams flow to be natural streams. AWDI argues, first, that the natural surface stream legislation is special legislation prohibited by Article V, Section 25, of the Colorado Constitution. AWDI also asserts that the unconfined aquifer is not part of a natural stream within the meaning of the statute defining nontributary ground water. In any event, AWDI argues, the trial court's conclusion that the water AWDI seeks to withdraw does not satisfy the statutory standard for nontributary ground water cannot be sustained because the court made no findings concerning relevant aquifer conditions existing at the time of the permit application, as is necessary to apply the definition of nontributary ground

water under section 37-10-103(10.5). We address these issues in the order stated.

1. *Challenge to Natural Stream Legislation as Special Legislation*

AWDI argues that the trial court erred in granting the objectors' motion for partial summary judgment declaring the natural surface stream legislation to be consistent with the constitutional prohibition of special legislation. AWDI contends, as it did before the trial court, that sections 37-82-101(2) and 37-92-102(1)(b), 15 C.R.S. (1990), constitute special legislation in violation of Article V, Section 25, of the Colorado Constitution. It asserts that these two statutes constitute special legislation because they apply only to stream systems in the Closed Basin and were intended to preclude the factual determination as to nontributariness that would otherwise be necessary in determining whether ground water in that basin is subject to the doctrine of prior appropriation applicable to tributary water rather than to allocation by landownership, the statutory basis for allocating nontributary ground water outside designated ground water basins. *See* § 37-90-102(2), 15 C.R.S. (1990); § 37-90-137(4), 15 C.R.S. (1990 & 1993 Supp.).

Article V, Section 25, of the Colorado Constitution prohibits the General Assembly from enacting special legislation. The relevant portion of Article V, Section 25, states simply, "where a general law can be made

applicable no special law shall be enacted."[31] As we stated in *Curtiss v. GSX Corp. of Colorado*, 774 P.2d 873 (Colo. 1989),

> [t]his constitutional prohibition is directed at "legislation that applies to some classes but not to others without a reasonable basis for distinguishing between them, or legislation that exempts some members of a class from coverage [of the general law] without a reasonable basis for the exemption."

*Id.* at 876 (quoting *City of Montrose v. Public Utilities Comm'n*, 732 P.2d 1181, 1190 (Colo.1987)). A law does not violate the constitutional prohibition against special legislation if it is "general and uniform in its operation upon all in like situation." *Curtiss*, 774 P.2d at 876, (quoting *McCarty v. Goldstein*, 151 Colo. 154, 158, 376 P.2d 691, 692-93 (1962)); *Rifle Potato Growers Ass'n v. Smith*, 78 Colo. 171, 176, 240 P. 937, 939 (1925); *People v. Earl*, 42 Colo. 238, 264, 94 P. 294, 302 (1908).

The statutes in question here provide that stream systems that terminate in Colorado are natural surface streams subject to appropriation. We regard this simply as recognition that such stream systems are natural streams within the meaning of Article XVI, Sections 5 and 6, of the Colorado Constitution and therefore subject to the constitutional right of appropriation. The legislature had a reasonable basis to address this particular class of

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[31] Article V, Section 25, of the Colorado Constitution, also specifically prohibits special laws in twenty-two express categories, none of which is applicable here.

streams and clarify the manner of obtaining rights to water in such stream systems.

The statutes satisfy the requirement that they be general and of uniform application. By their terms they apply to all stream systems in the state of Colorado that arise as natural surface streams and terminate in Colorado. The statutes are not limited to apply only to specific streams or specific geographic areas. When adopting the legislation, the legislature itself was aware of at least one other area in the state of Colorado to which the statutes would apply. *See* Senate Floor Debate on S.B. 481 (April 25, 1979).

Although the legislature was apparently aware of just two geographic regions that would be affected by the legislation, the number of class members known to be affected by the statutory criteria at the time of enactment is not determinative in deciding whether the legislation amounts to unconstitutional special legislation. In *Darrow v. People*, 8 Colo. 417, 8 P. 661 (1885), we upheld the constitutionality of legislation that created a superior court in any town or city that had more than 25,000 inhabitants, even though Denver was the only city of that size when the legislation was adopted. In *Darrow*, we stated that

> Denver, it is true, is the only city to which the act at present applies. But the legislature clearly intended to provide for places that may hereafter acquire the population mentioned. The law is general, and is unlimited as to time in its operation. There is nothing unreasonable in the supposition that other towns and cities within the

> state will eventually contain twenty-five thousand inhabitants.

*Darrow*, 8 Colo. at 418-19, 8 P. at 662; *cf. In re Interrogatories*, 146 Colo. 233, 361 P.2d 350 (1961) (a bill authorizing annexation of a town by a city under circumstances unique to one location and providing for automatic repeal of annexation authority shortly after enactment was unconstitutional as special legislation). Like the legislation at issue in *Darrow*, the natural surface stream legislation has an indefinite period of application. Analogous to *Darrow*, there is nothing unreasonable in the supposition that with the development and refinement of knowledge of the geography and hydrology of the state, it may be learned that there are other stream systems that arise as natural surface streams and terminate in Colorado. Therefore, in the future, this legislation may be found to apply to such other streams.

Because the two statutes are of general and uniform applicability, they do not constitute special legislation in violation of Article V, Section 25, of the Colorado Constitution. Accordingly, the trial court's partial summary judgment ruling will be upheld.[32]

2. *Inclusion of Unconfined Aquifer in Definition of Natural Stream*

The trial court concluded as a matter of law that "the unconfined aquifer is water of a natural stream," and that the proposed pumping of 200,000 acre feet per annum

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[32] Summary judgment was consistent with the principles governing the availability of such relief. *See supra* at 360.

would deplete the flow of that stream as well as other natural streams in the San Luis Valley to a greater extent than allowable in order to satisfy the criteria in the definition of nontributary ground water in section 37-90-103(10.5).

AWDI asserts first that the unconfined aquifer is not a natural stream within the meaning of section 37-90-103(10.5) because it does not fit the definition of "natural stream" in section 37-87-102(1)(b), 15 C.R.S. (1990). This argument has no merit.

Section 37-87-102(1)(b) provides:

> *As used in this article,* unless the context otherwise requires:
>
> * * *
>
> (b) "Natural stream" means a place on the surface of the earth where water naturally flows regularly or intermittently with a perceptible current between observable banks, although the location of such banks may vary under different conditions.

(Emphasis added.) The "article" referred to in the foregoing definition is Article 87, entitled "Reservoirs." By its own terms, the definition does not apply to section 37-90-103(10.5), which appears in a separate article 90, captioned "Underground Water." Also, section 37-90-103(10.5) specifically includes within the meaning of "natural stream" "a natural stream as defined in sections 37-82-101(2) and 37-92-102(1)(b)." The trial court found that the unconfined aquifer falls within these definitions as "a stream system which arises as a natural surface stream which terminates within the state,

together with its associated underflow and tributary water."

AWDI also argues that the amount of surface stream depletion alone determines whether water is nontributary within the meaning of section 37-90-103(10.5). This is incorrect. That section specifically refers to sections 37-82-101(2) and 37-92-102(1)(b) as included within the definition of natural streams. Those sections in turn refer to "a natural surface stream . . . together with its underflow and tributary waters." Clearly then, the underflow and tributary waters of streams described in the natural stream legislation are included as part of the natural streams referred to in section 37-90-103(10.5), and the effect on such underflow and tributary waters must be considered in determining whether ground water to be withdrawn is nontributary.

AWDI also challenges factual findings upon which the trial court relied in determining that the unconfined aquifer constitutes associated "underflow and tributary water" of a natural surface stream and therefore by definition is part of the natural surface stream. *See* §§ 37-82-101(2) and 37-92-102(1)(b). Specifically, AWDI contends that its evidence concerning the lack of hydraulic connection between the unconfined aquifer and surface streams was more weighty and credible than that of the objectors. Similarly, AWDI contends that its evidence concerning streambed conductance, which affects the movement of water into and out of the subsurface surrounding a stream is more persuasive. Our review of the record, however, reveals ample evidence supporting the trial court's findings on these matters. Issues of credibility are to be resolved by the trial court. Consequently,

the findings will not be disturbed on appeal. *See Upper Gunnison River,* 838 P.2d at 847.[33]

For the foregoing reasons we uphold the trial court's determination that the unconfined aquifer in the Closed Basin is part of a natural surface stream within the meaning of section 37-90-103(10.5).

3. *Requirement of Determination of Existing Aquifer Conditions at the Time of Permit Application*

Section 37-90-103(10.5) requires that a determination that ground water is nontributary "shall be based on aquifer conditions existing at the time of permit application. . . . " AWDI asserts that the trial court's order is not so based and that therefore the judgment must be reversed and remanded with directions to apply the statutory standard.

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[33] The trial court also found that without regard to the natural stream legislation, the unconfined aquifer is a natural stream within the meaning of the statutory and case law delineating the reach of the constitutional right of appropriation. AWDI has not challenged that analysis except as implicit in its factual challenge to the trial court's finding of a hydraulic connection between the unconfined aquifer and the surface streams. It is therefore unnecessary to address that analysis except to say that we agree that the statutory definition of nontributary ground water must be construed to be exclusive of those waters subject to the constitutional right of appropriation. *See Whitten v. Coit,* 153 Colo. 157, 385 P.2d 131 (1963) (doctrine of prior appropriation is not applicable to underground waters that are not tributary to any natural stream). There is no suggestion that the trial court's construction was not fully consistent with that principle.

AWDI did not present evidence directed at the conditions of the aquifer as they existed in 1986 when AWDI first filed its permit application. Rather, an expert witness for AWDI testified that conditions during the 1970s were representative of conditions at the time of the application. The objectors introduced evidence that conditions in the 1970s were not representative but that such period was untypically dry.[34] The trial court held that it need not resolve this controversy because it was satisfied, applying the statutory standard, "that the ground water sought by [AWDI] is tributary even if the period 1970-1979, or any period thereafter is used."[35] Again, the evidence was conflicting, the court made findings resolving the material conflicts, and therefore the findings of the trial court must be sustained on review.

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[34] The significance of this dispute relates to whether the unconfined acquifer, under "aquifer conditions existing at the time of the permit application" would be and remain in hydraulic connection with the surface streams. Absent such a connection, the unconfined aquifer arguably would not be part of a natural stream and any effect of AWDI's proposed withdrawals on water level in that aquifer would not be relevant to determination of nontributariness as defined in § 37-90-103(10.5).

[35] AWDI also argues that the trial court erred in adopting a speculative value for Closed Basin Project production, rather than the lower amount actually produced during the 1980s, by relying on the State's computer model. As the State points out in its brief, however, the Project is conditionally decreed 117,000 acre feet per year. The State used 75,000 acre feet per year in running its model as an estimate of probable sustained production based on the evidence concerning other constraints on production included in the Closed Basin Project degree. We cannot conclude that the trial court erred in implicitly recognizing that estimated production level as a condition existing at the time of the permit application.

C. *Whether the Trial Court Properly Precluded Challenge to Means of Diversion of Closed Basin Project*

AWDI argues that the trial court erred in granting partial summary judgment precluding AWDI from challenging the reasonableness of the means of diversion of wells producing from the unconfined aquifer on the basis of a water right decreed for the Closed Basin Project. We do not find it necessary to address this question on the merits.

The Closed Basin Project is a federal reclamation project that was authorized by the Reclamation Project Authorization Act of 1972.[36] The project was designed to withdraw water from the unconfined aquifer of the Closed Basin and deliver the water to the Rio Grande River. Under normal conditions, water that flows into the basin is collected in a sump area that is separated from the Rio Grande River drainage by a natural hydraulic barrier at the southern boundary of the Closed Basin. Once trapped there, much of the water is lost to evaporation and evaportranspiration. *See generally Closed Basin Landowners Ass'n v. Rio Grande Water Cons. Dist.*, 734 P.2d 627 (Colo.1987).

> The goal of the Closed Basin project is to lower the water table in the sump area by approximately two feet through the construction and operation of over one-hundred shallow wells, and to reduce water losses to evaporation and evapotranspiration. Water salvaged from the

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[36] Pub.L. No. 92-514, 86 Stat. 964 (1972), *as amended by* Pub.L. No. 96-375, § 6, 94 Stat, 1507 (1980; Pub.L. No. 93-570, 98 Stat. 2941 (1984); and Pub. L. No. 100-516, § 22, 102 Stat. 2566, 2575 (1988).

> sump area is to be delivered to the Rio Grande River to help meet Colorado's obligations to New Mexico and Texas under the Rio Grande Compact. *See* Rio Grande Compact, P.L. No. 96, 53 Stat. 785 (1939); § 37-66-101, 15 C.R.S. (1973).

*Id.* at 629.

In December of 1972, Rio Grande Water Conservation District, the local sponsoring entity for this federal project applied for determination of a conditional water right. In April 1980, in case W-3038, the District Court for Water Division 3 granted the application and decreed a conditional water right to withdraw 117,000 acre feet of water per year from 129 shallow wells situated on over 100,000 acres of lands. The wells would tap the unconfined aquifer in the Closed Basin. *See generally Closed Basin,* 734 P.2d at 629-31.

In the trial court, AWDI contended that in considering whether the ground water it sought to withdraw by its proposed wells is availble for appropriate under its tributary claim and whether withdrawals would materially injure the vested rights of others, *see* § 37-90-137(2), 15 C.R.S. (1993 Supp.), the court must address whether the Closed Basin wells, which are limited by decree to withdrawals from the unconfined aquifer, constitute a reasonable means of diversion. *See* § 37-92-102(2)(b) 15 C.R.S. (1990); *Alamosa-LaJara,* 674 P.2d at 934-35; *City of Colorado Springs v. Bender,* 148 Colo. 458, 462, 366 P.2d 552, 555 (1961).[37] AWDI's position was that any injury to the

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[37] The reasonable means of diversion issue, as applied to tributary ground water, was first explained in *Bender*:

Closed Basin Project that might otherwise result from AWDI's proposed pumping should be addressed by requiring that the Project wells be deepened to produce water from the confined aquifer. Prior to trial, Rio Grande Water Conservation District moved for partial summary judgment to preclude AWDI from challenging in this proceeding the District's adjudicated water right for the Closed Basin Project. The trial court granted the motion, finding that the doctrine of *res judicata* barred any challenge to the Closed Basin Project decree. The court specifically stated that the applicant was barred from challenging "the reasonableness of the means of diversion established for the well withdrawals decreed in the April 21, 1980 Decree in Case No. W-3038, including the requirement that the depth of the wells be restricted to the unconfined aquifer." On this appeal, AWDI asserts that the court must consider whether the Closed Basin

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> . . . priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below, where there would be an adequate supply for the senior's lawful demand.
>
> * * *
>
> The plaintiffs cannot reasonably "command the whole" source of supply merely to facilitate the taking by them of the fraction of the entire flow to which their senior appropriation entitles them. On the other hand, plaintiffs cannot be required to improve their extraction facilities beyond their economic reach, upon a consideration of all the factors involved.

*Bender*, 148 Colo. at 462, 465, 366 P.2d at 555, 556.

Project's means of diversion is reasonable. We need not reach this question.

The central issue in the case at trial was whether the water sought to be withdrawn was nontributary within the meaning of section 37-90-103(10.5), as claimed by AWDI. Reasonableness of the means of diversion of Closed Basin Project wells had no bearing on that issue, and AWDI did not prevail on its claim. The issue of reasonableness of means of diversion arose in connection with AWDI's tributary claim. AWDI, however, voluntarily dismissed that claim.

In general, a claimant who voluntarily dismisses a claim cannot appeal from the judgment of dismissal, for the judgment cannot be considered adverse as to the one who sought it. *Jensen v. Matthews-Price, M.D.*, 845 P.2d 542, 543 (Colo.App.1991); *accord Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 555 (9th Cir.1986), *cert. denied*, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) & 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir.1976); *see also* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2376 (1971) (hereinafter "Wright & Arthur R. Miller"). And, as the Sixth Circuit Court of Appeals has observed,

> [e]ven in those rare jurisdictions . . . which permit appeal from an order of voluntary nonsuit where there is a ruling of the court which strikes at the heart of the case and precludes recovery by plaintiff, appeal from such order does not lie to review rulings which do not have the effect of determining the case against plaintiff.

*Management Investors v. United Mine Workers of Am.*, 610 F.2d 384, 394 (6th Cir.1979) (quoting *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F.2d296, 297 (4th Cir.1936)). *Cf. Harrington v. Anderson*, 87 Colo. 417, 419, 288 P. 1049, 1050 (1930) (we will not as a general rule pass on questions not necessary to the decision); *Olney Springs Drainage Dist. v. Auckland*, 83 Colo. 510, 517, 267 P. 605, 608 (1928) (same). We do not regard the reasonable means of diversion issue as one that strikes at the heart of the tributary claim. In view of AWDI's voluntary dismissal of that claim, we hold that the partial summary judgment on the reasonableness of the means of division of the Closed Basin Project wells is not properly reviewable on this appeal.

## IV. *Procedural Prejudice*

### A. *Whether the Trial Court's Case Management Order and its Implementation Unfairly Prejudiced AWDI*

In May of 1990, three and one-half years after the case was filed the objectors moved for the entry of a case management order that would structure discovery and the pretrial process, including establishment of a discovery schedule and deadlines for amendments to AWDI's water application. In July of 1990 the court entered its case management order. Dates were set before which all motions to amend the application had to be filed, discovery had to be completed, and lists identifying all expected testifying experts, fact witnesses, and exhibits had to be served upon all parties. AWDI was ordered to identify its experts and their proposed testimony as well as its fact witnesses and exhibits before the times the objectors were required to disclose their own witnesses and exhibits.

AWDI now asserts that the case management order and its implementation were unfairly prejudicial. It argues that there was no justification for the requirement that AWDI identify its witnesses and exhibits before the objectors and that this order unfairly enabled the objectors to conduct discovery "before providing reciprocal information." In addition, AWDI maintains that because the trial court allowed the objectors to introduce late-designated evidence, there was "one-sided" enforcement of the order and that AWDI was unfairly afforded "fewer procedural protections" than the objectors.

Generally, pretrial discovery rulings are within the sound discretion of the trial court. *In re Marriage of Mann* 655 P.2d 814, 816 (Colo.1982); *Kerwin v. District Ct.*, 649 P.2d 1086, 1088 (Colo.1982); *Cameron v. District Ct.*, 193 Colo. 286, 289, 565 P.2d 925, 928 (1977); *see also Glisan v. Kurth*, 153 Colo. 102, 107, 384 P.2d 946, 949 (1963) ("to make pre-trial procedure effective, appellate interference with the trial court in this area must be kept at a minimum"). The trial court's decision to prescribe staggered discovery was fully justified by the nature of the issues in this case. AWDI had the burden of proof to establish its alternative claims for tributary or nontributary rights. *See Public Service Co. of Colo. v. Board of Water Works of Pueblo, Colo.*, 831 P.2d 47, 480 (Colo.1992) (relating to tributary application). The central issue was whether the water to be produced was tributary or nontributary. It evaluate the application it was necessary to understand the complex factual framework concerning the geology and hydrology of the Valley, AWDI's computer model, and the data that would be used in running the model upon which AWDI predicated its claim. It was therefore reasonable to

require AWDI to proceed first in order for the objectors to be able to discern the facts AWDI would rely upon to support its application in order to prepare the objectors' own case. Particularly considering the fact that AWDI was allowed to designate rebuttal experts after it had completed discovery from the objectors' expert witnesses, we cannot say that the trial court's decision to compel AWDI to identify its witnesses and exhibits before the objectors was an abuse of discretion.

As for the alleged prejudice to AWDI from the court's "one-sided" implementation of the order, the record does not support this claim. The trial court did modify the management order to allow the objectors to introduce additional evidence, but this evidence did not create unfair surprise. The evidence consisted of another run from a previously introduced computer model showing the predicted results from a particular pumping scenario proposed by AWDI, as well as related testimony, and two demonstrative exhibits that graphically displayed data already available to AWDI. Moreover, the court granted a number of modifications for AWDI itself, including allowing the presentation of rebuttal testimony from a witness not identified until trial was underway.

A trial court has broad discretion in allowing deviations from the terms of pretrial orders. *Murphy v. Colorado Aviation, Inc.*, 41 Colo.App. 237, 241, 588 P.2d 877, 881 (1978); *Impliedly overruled on other grounds by Public Service Co. v. District Ct.*, 674 P.2d 383 (Colo.1984); *see C.K.A. v. M.S.*, 695 P.2d 785, 788 (Colo.App.1984) (trial courts have broad discretion in determining whether to allow late endorsement of witnesses not listed in pretrial

orders).[38] AWDI has not demonstrated that the trial court abused that discretion.

B. *Whether the Trial Court's Rulings were Objective*

AWDI asserts that the trial court's rulings were not properly objective. In support of its position, AWDI cites a number of pretrial motions on which the trial court ruled in favor of the objectors by entering precisely the form of order proposed by them. AWDI also points out that the decree entered by the trial court was virtually identical to the objectors' proposed decree.

Adoption of a prevailing party's proposed findings of fact and conclusions of law is not necessarily improper. "[F]indings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel." *Uptime Corp. v. Colorado Research Corp.*, 161 Colo. 87, 93, 420 P.2d 232, 235 (1966). Even those courts that condemn the uncritical adoption of findings prepared by the

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[38] According to a treatise on the Federal Rules of Civil Procedure:

> "Rule 16, . . . permitting pretrial procedures, can achieve its purpose of improving the quality of justice only if the pretrial requirements entered at the discretion of the trial court are applied with intelligent flexibility, taking into full consideration the exigencies of each situation. The trial judge must be permitted wide latitude in guiding a case through its preparatory stages."

3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 16.19 (2d ed. 1993) (quoting *Davis v. Duplantis*, 448 F.2d 918, 921 (5th Cir.1971)).

prevailing party are unwilling to reverse unless the findings themselves are inadequate. *Id.* at 92, 420 P.2d at 235.

> On appeal, the court will assume that the trial judge examined the proposed findings and agreed that they correctly stated the facts as he himself found them to be; otherwise, he would not have adopted them as his own. It is only when the findings themselves are inadequate and do not indicate the basis for the trial court's decision that the judgment will be reversed.

*Id.* at 93, 420 P.2d at 235 (citations omitted). The findings are sufficient and indicate the basis for the trial court's decisions. Therefore, they will be sustained despite the fact that the trial judge adopted the language of the prevailing party's proposed findings and conclusions as his own.

V. *Excessive and Unwarranted Findings*

AWDI asserts that the trial court's 104 page Findings of Fact, Conclusions of Law, Judgment and Decree contains "a multitude of findings and conclusions irrelevant to the character of the water [as tributary or nontributary]" and requests that these findings and conclusions be excised from the decree. AWDI expresses concern that some of these findings may have a collateral estoppel effect in the event a tributary claim is reasserted in the future. We believe this concern is ill founded.

Collateral estoppel bars relitigation of an issue only under the following conditions:

> (1) The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding;
>
> (2) the party against whom estoppel is sought was a party to or was in privity with a party to the prior proceeding;
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> (3) there was a final judgment on the merits in the prior proceeding; and
>
> (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

*Denver v. Consolidated Ditches Co.*, 807 P.2d 23, 32 (Colo.1991); *accord, e.g., Pomeroy v. Waitkus*, 183 Colo. 344, 350-51, 517 P.2d 396, 399 (1973). To the extent that any of the findings and conclusions of the trial court were not necessarily adjudicated or actually litigated under circumstances where AWDI had a "full and fair opportunity to litigate," they can have no collateral estoppel effect. Once the tributary claim had been dismissed and the injury and mitigation issues eliminated by bifurcation, the issues necessarily adjudicated were those required for determination of whether the water sought to be withdrawn met the statutory definition of nontributary ground water. Therefore, to the extent the trial court's findings and conclusions go beyond those necessary for such a determination, they can have no collateral estoppel effect in future litigation. Under these circumstances, we consider it unnecessary to make a determination of which, if any, of the findings and conclusions are not necessary or to excise any such findings or conclusions from the Findings of Fact, Conclusions of Law, Judgment and Decree.

VI. *Awards of Attorney Fees, Expenses, and Costs*

Having rejected AWDI's objections to the merits of the trial court's judgment, we now turn to AWDI's objection to the awards of attorney fees, expenses, and costs. A summary of the proceedings leading up to the awards is necessary to an understanding of AWDI's objections.

On September 26, 1991, almost five years after AWDI filed its application and following extensive discovery conducted by both AWDI and the objectors, a pretrial conference was held in preparation for a trial scheduled to begin on October 15, 1991. Prior to the pretrial conference, AWDI's land grant claims had been dismissed by partial summary judgment. As a result, AWDI's alternative claims for nontributary and tributary water rights were the only remaining bases for its asserted right to withdraw 200,000 acre feet of water per year by its proposed wells. Near the conclusion of the pretrial conference and without prior notice to the objectors, AWDI moved to dismiss, without prejudice, its application for determination of tributary water rights, taking the position that as a result of the trial court's rulings in this action, and other circumstances, it no longer had a "reasonable likelihood of prevailing on the claim." The objectors sought and were granted the opportunity to respond. In briefs, they took the position that if the court exercised its discretion to dismiss under C.R.C.P. 41(a)(2), the order of dismissal must be conditioned upon the award of all fees and expenses incurred by the objectors in defending against the tributary claim. The court held a nonevidentiary hearing and thereafter entered a written order dismissing the tributary claim without prejudice but

requiring AWDI to pay to the objectors "all of their attorneys' fees, expert witness fees and costs, and other fees and expenses related to the Tributary Claim." The court ordered that a hearing to determine the amounts to be awarded would be held immediately following the trial on the nontributary claim, at which time the court would "consider the reasonableness of those fees and costs and the necessity of those expenditures."

Following the trial and resulting dismissal of the nontributary claim, the objectors sought recovery of attorney fees, expenses, and costs pursuant to the order dismissing the tributary claim under C.R.C.P. 41(a)(2) and also sought costs under C.R.C.P. 54(d) incident to the judgment of dismissal of the nontributary claim. AWDI opposed the requested awards. The court then held a three day evidentiary hearing to determine the amounts to be awarded to the objectors. At the conclusion of the hearing the court made findings and entered a judgment for the objectors in amounts totaling $2,236,790.40 for attorney fees, expenses including expert witness fees, and costs incurred in defending against the tributary claim, as well as $473,091.31 for other costs incident to the litigation resulting in dismissal of the nontributary claim.[39]

AWDI challenges the awards on several bases. First, it asserts that a court cannot condition voluntary dismissal of a claim on the payment of attorney fees, expenses, and costs under C.R.C.P. 41(a)(2), for to do so would violate section 13-17-102(5), 6A C.R.S. (1987), and

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[39] The court detailed the nature and amounts of the awards to each of the individual objectors who received such awards.

C.R.C.P. 11. Second, AWDI argues that because of the unique nature of water adjudication and based upon Colorado Uniform Water Court Rule 5(b), Rule 41(a)(2) is not applicable to litigation concerning water rights. Third, AWDI contends that the awards were improper and excessive because the court employed an incorrect standard in evaluating the C.R.C.P. 41(a)(2) claims, and the evidence adduced in support of those claims was legally insufficient. Finally, AWDI challenges the amount of the costs awarded to the objectors under C.R.C.P. 54(d) as an abuse of discretion, lacking in sufficient evidentiary support, and not based on sufficient findings.

The objectors assert that AWDI cannot contest the awards made under C.R.C.P. 41(a)(2) because they were ordered incident to the dismissal of the tributary claim, which AWDI requested. We first address this threshold issue and then consider AWDI's objections to the awards.

A. *Whether AWDI can Contest the Conditions of Dismissal of the Tributary Claim*

The objectors contend that having asked for and enjoyed the benefit of voluntary dismissal without prejudice, AWDI cannot now be heard to complain about the terms imposed as a condition of the dismissal by the court. The terms were imposed pursuant to C.R.C.P. 41(a)(2), which provides in relevant part:

> [Subject to an exception not applicable here], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the

> order, a dismissal under this subsection (2) is without prejudice.

Fed.R.Civ.P. 41(a)(2) is virtually identical, so federal precedent will be helpful in resolving this issue. *See United States v. Bell*, 724 P.2d 631, 645 n. 18 (Colo.1986); *Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1125 n. 3 (Colo.1982); *United Bank of Denver Nat'l Assoc. v. Shavlik*, 189 Colo. 280, 282, 541 P.2d 317, 318 (1975).

Generally, a plaintiff may not appeal from an order granting its request for voluntary dismissal. *Jensen v. Matthews-Price, M.D.*, 845 P.2d 542, 543 (Colo.App.1992); *accord Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 555-56 (9th Cir.1986), *cert. denied*, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) & 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir.1976); *see also* 9 Wright & Miller § 2376. This rule is premised on the rationale that "such a dismissal cannot be characterized as an involuntary adverse judgment against the plaintiff." *Jensen*, 845 P.2d at 543; *see also* 5 James Wm. Moore et al., *Moore's Federal Practice* ¶ 41.05[3] (2d ed. 1993). As the United States Court of Appeals for the Fifth Circuit has noted, when such a dismissal is granted,

> the plaintiff has acquired that which he sought, the dismissal of his action and the right to bring a later suit on the same cause of action, without adjudication of the merits. The effect of this type of dismissal is to put the plaintiff in a legal position as if he had never brought the first suit.

*LeCompte*, 528 F.2d at 603.

In the present case, however, the dismissal was conditioned on terms imposed by the court under C.R.C.P. 41(a)(2) and to which AWDI never assented. The Colorado Court of Appeals has stated that rather than accept the terms and conditions of dismissal, "if a trial court places 'terms and conditions' upon a dismissal under C.R.C.P. 41(a)(2) which are unacceptable to plaintiff, plaintiff is entitled to elect to proceed with the litigation." *Powers v. Professional Rodeo Cowboys*, 832 P.2d 1099, 1104 (Colo.App.1992); *accord, e.g., Marlow v. Winston & Strawn*, 19 F.3d 300 (7th Cir.1994); *Unioil*, 809 F.2d at 554; *see also* 9 Wright & Miller § 2366. We have not previously been required to decide whether a plaintiff who disagrees with the legal or factual basis for terms or conditions imposed in an order dismissing a claim on the plaintiff's motion may choose not to proceed with litigation of the claim and yet preserve a right to challenge the terms and conditions on appeal.

The federal circuits have not adopted a single consistent analytic approach in deciding whether a plaintiff can appeal conditions imposed upon it under Fed.R.Civ.Proc. 41(a)(2) pursuant to a voluntary dismissal without prejudice. *Cauley v. Wilson*, 754 F.2d 769, 770 (7th Cir.1985); *see also* discussion in *Unioil*, 809 F.2d at 555-56. Some cases have held that conditions imposed in voluntary dismissal orders can be challenged on appeal only if they amount to legal prejudice. *Unioil*, 809 F.2d at 555-56; *LeCompte*, 528 F.2d at 603. The condition of payment of the opposing party's costs and expenses has been stated to constitute prejudice in a practical sense but not legal prejudice. *Unioil*, 809 F.2d at 555-56; *LeCompte*, 528 F.2d at 603. The

same court that decided *LeCompte*, however, has suggested that there will be cases

> in which the amount of money set as the price of a voluntary dismissal without prejudice is so clearly unreasonable as to amount to appealable 'legal prejudice'. . . . We will examine each case to ensure that the terms and conditions accompanying the grant of a plaintiff's Rule 41(a)(2) motion are not so outrageous as to demand a full appellate review.

*Yoffe v. Keller Indus., Inc.*, 580 F.2d 126, 131 (5th Cir.1978), *cert. denied*, 440 U.S. 915, 99 S.Ct. 1231, 59 L.Ed.2d 464 (1979); *see also Mortgage Guaranty Ins. Corp. v. Richard Carylon Co.*, 904 F.2d 298, 300-01 (5th Cir. 1990); *Scholl v. Felmont Oil Corp.*, 327 F.2d 697, 700 (6th Cir.1964). This approach tends to intermingle the issue of entitlement to review and that of the reasonableness of the payment imposed. The Seventh Circuit Court of Appeals in *Cauley* adopted a more direct approach and permitted review of a condition to voluntary dismissal in order to assess abuse of discretion. The court explained:

> [A] plaintiff may understand that the dismissal without prejudice is conditioned on paying attorneys' fees yet disagree with the amount of fees awarded. Thus an order awarding attorneys' fees may qualify as an involuntary adverse judgment even though the plaintiff requested and received the Rule 41(a)(2) dismissal.

*Cauley*, 754 F.2d at 771; *see GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 367-68 (D.C.Cir. 1981).

We adopt the approach in *Cauley* and also consider it appropriate to take cognizance of challenges to the legal propriety of imposing terms and conditions of dismissal, which we view as an assertion of "legal prejudice." *See Unioil*, 809 F.2d at 555-56; *LeCompte*, 528 F.2d at 603. Of course, it must also be shown in order to challenge a term or condition of dismissal on appeal that the party seeking dismissal did not actually acquiesce in imposition of the condition. *Mortgage Guaranty*, 904 F.2d at 300.

In the present case AWDI was aware that terms and conditions would be imposed incident to its voluntary dismissal. When the trial court orally granted AWDI's motion to dismiss on October 10, 1991, the court stated that the dismissal was subject to the condition that AWDI pay to the objectors "all attorney fees and expert witness fees and other fees and expenses incurred by the objectors that are otherwise appropriate during the pendency of this litigation which relate to the tributary claim." AWDI then proceeded to trial on October 15, 1991, on the nontributary claim alone.

Although aware of the terms and conditions imposed, AWDI never acquiesced to them. AWDI asserted in proceedings before the trial court that such terms and conditions were not legally permissible and has consistently maintained this position in the trial court and on appeal. The court in *LeCompte* determined that the plaintiff had not acquiesced to the conditions of dismissal where he not only objected to the inclusion of the defendant's proposed conditions in the dismissal order, but vigorously renewed his objections after the court issued its order, and – failing to obtain relief – then brought an appeal. The fact that the plaintiff never sought to have

the voluntary dismissal set aside was not considered dispositive. *LeCompte,* 528 F.2d at 604.

We hold that a party such as AWDI that obtains a voluntary dismissal of its claims subject to terms and conditions to which it consistently maintains its objections may challenge those terms and conditions as legally impermissible or as an abuse of discretion on appellate review. We consider it especially appropriate to address the challenge to the amount of the fees and expenses imposed here, because the amount had not been quantified at the time AWDI decided to go forward with the nontributary claim alone.

B. *Whether Section 13-17-102(5) or C.R.C.P. 11 Precludes an Award of Attorney Fees and Expenses incident to Dismissal of the Tributary Claim*

AWDI asserts that a requirement for payment of attorney fees and expenses as a term or condition of an order granting voluntary dismissal of a claim cannot be imposed in the absence of evidence and findings satisfying the requirements of section 13-17-102(5), 6A C.R.S. (1987), and C.R.C.P. 11 – provisions which have no analogs in the federal statutes or rules. We disagree.

As earlier noted, C.R.C.P. 41(a)(2) provides that, with exceptions not pertinent here, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Section 13-17-102(5) provides:

> No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after

> the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action.

C.R.C.P. 11 provides, in pertinent part:

> Reasonable expenses, including a reasonable attorney's fee, shall not be assessed if, after filing, a voluntary dismissal or withdrawal is filed as to any claim, action or defense, within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense.

AWDI argues that the trial court could not impose attorney fees as a term or condition of dismissal under C.R.C.P. 41(a)(2) in the absence of a finding that AWDI did not move to dismiss within a reasonable time after it knew or reasonably should have known that it would not prevail on its tributary claim, as required by section 13-17-102(5) and C.R.C.P. 11. AWDI asserts that both those provisions are applicable whenever payment of attorney fees is imposed upon a party incident to dismissal of a claim, including dismissals under C.R.C.P. 41(a)(2).

Preliminarily, we note that AWDI offers no case support for its assertion that section 13-17-102(5) and Rule 11 apply to limit a trial court's discretion to impose terms and conditions on a grant of voluntary dismissal under Rule 41(a)(2). The limited number of Colorado cases that have interpreted the latter rule have never mentioned any limitation of that kind. *See Tillery v. District Ct.*, 692 P.2d 1079, 1084 (Colo.1984) (trial court may award costs and fees to defendant as a term and condition of voluntary

dismissal); *Powers v. Professional Rodeo Cowboys*, 832 P.2d 1099, 1102 (Colo.App.1992) (same).

More importantly, the purpose of Rule 41 is different than the objectives of section 13-17-102(5) and Rule 11. The language of both section 13-17-102 and Rule 11 expresses an intention to sanction a party who has continued to pursue a claim after the party or its attorney knew or should have known that the party would not prevail, i.e., that the claim is not meritorious.[40] No such language is present within Rule 41(a)(2).[41] Rule 41(a)(2) is intended to give the plaintiff the right to dismiss a claim that may later become viable or may be asserted later in a different forum, provided the court can ensure the defendant will not be unfairly prejudiced. *Tillery*, 692 P.2d at 1084; *accord McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir.1985) (terms and conditions imposed pursuant to Rule 41(a)(2) are the "quid pro quo" of allowing plaintiff to dismiss a potentially meritorious claim without being prevented by the doctrine of res judicata from bringing the same suit

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[40] In fact, article 17, part 1, of the statute, in which § 13-17-102 appears, is captioned "Frivolous, Groundless, or Vexatious Actions," and is commonly known as the "frivolous and groundless litigation statute." 17 Colo.Law 465 (1988). *See also* § 13-17-101, 6A C.R.S. (1987) (legislative declaration that statute addresses claims that are "substantially frivolous, substantially groundless, or substantially vexatious"); *Shaw v. Baesemann*, 773 P.2d 609, 611 (Colo.App.1989) ("Both the title and purpose of the statute evince an intent to apply it only to frivolous, groundless, or vexatious actions.").

[41] In its reply brief in this court, AWDI acknowledges that "Rule 41(a)(2) is not intended to punish the party voluntarily dismissing a claim, nor to serve any purpose other than reimbursements."

again); *GAF Corp.*, 665 F.2d at 369 ("[n]o matter how conscientious and diligent [plaintiff] may have been, [defendant] suffered some costs by defending this action . . . and [defendant] is entitled to such reimbursement of those costs as the court may order"); *LeCompte*, 528 F.2d at 604 (Rule 41(a)(2) "allows the plaintiff to withdraw his action from the court without prejudice to future litigation"); 9 Wright & Miller § 2362. According to *Tillery*, a plaintiff's Rule 41(a)(2) motion to dismiss voluntarily without prejudice "generally should be granted," *Tillery*, 692 P.2d at 1085, but the court must first determine that any harm to the defendant may be avoided by imposing terms and conditions of dismissal.

Thus, a court's focus when determining appropriate terms and conditions under C.R.C.P. 41(a)(2) is necessarily on a remedy for the defendant, not punishment of the plaintiff. Rule 41(a)(2) provides a means for preserving a potentially meritorious claim for another day or another forum provided that conditions of dismissal can be devised to protect the defendants from prejudice. Section 13-17-102(5) and Rule 11, on the other hand, are intended to protect a plaintiff from imposition of attorney fees upon dismissal of an unmeritorious claim provided that the plaintiff seeks dismissal promptly after learning that the claim cannot prevail.

Although AWDI asserts that allegedly erroneous pretrial rulings by the trial court destroyed the prospects for success in establishing the tributary claim, AWDI has never conceded or suggested that such a claim was not meritorious or that it will not reassert such a claim in the future. We therefore reject AWDI's argument that imposition of a requirement of payment of attorney fees as a

condition of voluntary dismissal without prejudice of a claim under C.R.C.P. 41(a)(2) violates either section 13-17-102(5) or C.R.C.P. 11.

C. *Whether the Special Nature of Water Adjudication Proceedings Precludes the Award of Fees and Expenses Incident to Dismissal of the Tributary Claim*

AWDI also contends that the condition concerning payment of fees and expenses that was included in the court's C.R.C.P. 41(a)(2) order of dismissal of the tributary claim fails to take account of and is inconsistent with the unique nature of water right adjudication. We disagree.

AWDI notes that, unlike typical civil cases, once an application for determination of a water right or a right to nontributary ground water is filed, any person who wishes may file a statement of opposition, without complying with traditional standing requirements. *See* § 37-92-302(1)(b), 15 C.R.S. (1990); *Bunger v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 165, 557 P.2d 389, 392 (1976). Thus, an applicant has no control over the number of objectors who participate in an action, or the fees and expenses they may generate. AWDI asserts that for this reason the imposition of fees and expenses in a water case can quickly become unfairly burdensome on the applicant. Every potential applicant, regardless of financial resources, would have to consider the possibility of future payment of objectors' fees and expenses in the event the applicant should later wish to dismiss its application. AWDI asserts that Colorado Uniform Water

Court Rule 5(b)[42] reflects this distinction between water court proceedings and other civil actions in its provision for voluntary dismissals. Rule 5(b) requires court approval for withdrawal of a water rights application if a statement of opposition has been filed, but makes no provision for the imposition of "terms and conditions."

A note at the beginning of the Uniform Local Rules For All State Water Court Divisions provides in relevant part, "[e]xcept as expressly provided in these rules, the Colorado Rules of Civil Procedure . . . shall apply to water court practice and procedure." Rule 5(b) contains no indication that C.R.C.P. 41 is not fully applicable to water cases. The fact that the number of objectors who need protection from prejudice by terms and conditions in an order of voluntary dismissal is large provides no persuasive reason to permit an applicant to obtain dismissal of a claim without providing such protection. We reject the contention that C.R.C.P. 41(a)(2) does not apply to water right adjudications.

D. *Whether the Trial Court Employed an Incorrect Standard or Relied on Insufficient Evidence in Assessing Fees and Expenses incident to Dismissal of the Tributary Claim*

AWDI asserts that even if the trial court could award fees and expenses as a condition of voluntary dismissal of

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[42] Rule 5(b) provides:

An application against which a statement of opposition has been filed shall not be withdrawn or dismissed except by order of the court.

Rule 5(b), Uniform Local Rules For All State Water Court Divisions, 7B C.R.S. (1993 Supp.).

a claim, the court erred by employing an incorrect standard in determining the extent to which the fees and expenses are allowable. Furthermore, AWDI contends, evidence adduced in support of the amounts assessed was legally insufficient.

1. *Correctness of Standard*

We first address whether the court used the correct standard in determining attorney fees and expenses. AWDI argues that the trial court did not properly limit the award to those fees and expenses for activities that were rendered useless by the dismissal. Such a criterion, it contends, is the correct standard for assessing the limits of a permissible award of fees and expenses incident to a voluntary dismissal under C.R.C.P. 41(a)(2).

*Tillery* contains some guidance concerning the proper standard:

> The district court could require the costs and fees to be reimbursed as a condition of granting the motion to dismiss, although consideration should be given to the fact that the defendants may recoup some of the fees if they prepare an answer to the petitioner's complaint in federal court.

*Tillery*, 692 P.2d at 1085. Because C.R.C.P. 41(a)(2) is "identical to the corresponding federal rule and the rules adopted by several other states," *Tillery*, 692 P.2d at 1084, it will also be helpful to look to the standards applied in cases outside this jurisdiction for guidance. Federal courts have consistently limited reimbursement under Fed.R.Civ.P. 41(a)(2) to expenses for work that will not be

useful in future litigation of the same claim. *Lau v. Glendora Unified School District*, 792 F.2d 929, 932 (9th Cir.1986) (Reinhardt, J., concurring) (defendant "not entitled to reimbursement of costs and legal fees incurred in preparing work product that may be useful in continuing litigation"); *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 860 (11th Cir.1986) (where a subsequent similar suit between the parties is contemplated, expenses awarded might be limited to those incurred in discovering information that will not be useful in the later suit); *Cauley*, 754 F.2d at 772 (trial court found to have abused its discretion in awarding fees for work product which could be useful in defending same claim in state court where claim was being pursued); *McLaughlin v. Cheshire*, 676 F.2d 855, 856-57 (D.C.Cir.1982) (no entitlement to reimbursement for expenses in preparing work product that will be useful in continuing litigation in another forum); *GAF Corp.* 665 F.2d at 369 (same); *Brown v. Zackert*, 10 Kan.App.2d 466, 701 P.2d 711, 714 (1985) ("while the conditions of dismissal are within the discretion of the court, the range of that discretion is confined to terms which relieve the defendant from the potential waste occasioned by the dismissal"). These cases are consistent with *Tillery* and provide helpful elaboration of the standard that we suggested in that case.

AWDI asserts that the trial court failed to apply this standard in the present case. In issuing the payment order, the trial court noted that dismissal of the tributary claim had previously been conditioned on the applicant's payment to the objectors of "all of their attorney fees, expert witness fees, costs, fees, and other expenses related to the tributary claim." AWDI contends that the

words "related to" sweep too broadly and asserts that this language is evidence that the trial court improperly ordered the payment to the objectors of all expenses having anything to do with the tributary claim, including those incident to gathering information also useful in litigating the nontributary claim or that could be used against AWDI in future litigation of the tributary claim.

The remainder of the trial court's order, however, indicates that the court properly considered the danger of overlap with the nontributary claim and the possibility that work expended on the tributary claim would be useful in future litigation of the latter claim. The court rejected the possibility that work devoted to the tributary claim would be useful in future litigation of that claim, stating:

> Depending on when a new tributary claim may be filed, much of the material discovered by Objectors prior to September 1991 will be outdated, if not useless, in any hearing concerning a "new" tributary claim. Any benefit from this earlier discovery is speculative at best.

In addition, the trial court expressly recognized the necessity of avoiding reimbursement of expenses incurred in gathering information useful in litigation of the nontributary claim. Out of concern about the possibility of "overlap," among other things, the court discounted the award of attorney fees and expense claims by ten percent.

Other than the court's use of the phrase "related to the tributary claim," AWDI offers no support for its contention that the trial court failed to apply the proper standard limiting its award of attorney fees and costs

under Rule 41(a)(2) to expenses for work that it determined was not useful in defending against the nontributary claim or would not be of use in future litigation of a renewed tributary claim. We reject the contention that the trial court used the wrong standard in awarding fees and expenses.

2. *Sufficiency of Evidence*

AWDI asserts that even if the court used the proper standard, the evidence was insufficient to identify the fees and expenses incurred for work useful only on the tributary claim, failed to establish that the scope of the work on that claim was reasonable, and failed to show the reasonableness of the amounts charged for such work. We disagree with each of these assertions.

a. *Identification of Fees and Expenses Attributable to Tributary Claim*

AWDI as well as the objectors understood that determining an appropriate award might be difficult due to the possibility of overlap between the work performed and information gathered by the objectors to defend against the nontributary claim which went to trial and the efforts directed to defend against the tributary claim which was dismissed. This difficulty occurred in part because until AWDI unexpectedly moved to dismiss the tributary claim, the objectors had no reason to distinguish carefully between the two claims in maintaining their records of work performed and expenses incurred.

The party requesting an award of attorney fees bears the burden of proving by a preponderance of the evidence its entitlement to such an award. *Kinsey v. Preeson*, 746 P.2d 542, 551-52 (Colo.1987) (citing *Board of County Comm'rs v. Auslaender*, 745 P.2d 999, 1001-02 (Colo.1987)); *see* § 13-25-127, 6A C.R.S. (1987) (burden of proof in any civil action, except claim for exemplary damages or body execution, "shall be by a preponderance of the evidence"); *Spensieri v. Farmers Alliance Mutual Ins. Co.*, 804 P.2d 268, 271 (Colo.App.1990) ("If the attorney provides a reason and rational basis for the work done, he or she should be compensated accordingly. . . . "); *see also Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984) (when the fee claimant has carried his burden of showing that the claim rate and number of hours are reasonable, the product is presumed to be the reasonable fee contemplated by 42 U.S.C. § 1988). Counsel is not required "to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n. 12, 103 S.Ct. 1933, 1941 n. 12, 76 L.Ed.2d 40 (1983). This was done.

In this case the objectors' attorneys introduced time records kept contemporaneously with work done. The extent of the information varied, and the records kept by the private attorneys were generally more detailed than those of the government attorneys, but all included the

date, the attorney, the time expended, and a general statement of work done.[43]

In addition, attorneys for the objectors testified as to the manner in which they allocated fees and expenses between the tributary and nontributary issues for the purpose of their claims under C.R.C.P. 41(a)(2). For instance, the lead attorney for the United States testified that virtually all of his time was devoted to the tributary claim, "but we decided to make the figure 85 percent, which is, I think, a very conservative estimate." The attorney for Oliver Powell Roemer III and Howard Platz testified that the concerns of both of those clients were limited to the tributary claim. He averred, "By definition, if the water was nontributary, it could not affect their water rights. Only tributary claims could affect their water rights." Accordingly, the fees and expenses incurred on behalf of those clients were limited to the tributary claim.

In response to AWDI's assertion that the objectors' work defending against the tributary claim must have been used in litigating the nontributary claim, an attorney for Rio Grande Water Users Association and San Luis Valley Water Conservancy District stated:

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[43] The attorneys' time records introduced into evidence contained excisions for time spent on portions of the case other than the tributary claim. Although AWDI objected to such excisions, we fail to see how they inhibited the trial court's ability to evaluate the unexcised portions and determine whether they applied to the tributary claim.

> There's a big difference between trying a tributary claim and a nontributary claim. In a nontributary claim, all you've got to show is impact on any stream of one-tenth of 1 percent. In a tributary claim, you've got to know which stream systems are impacted and what amounts with a good deal of greater precision. . . .

This attorney also testified, "[Y]ou spend a lot of time on a whole broad range of issues related to – on a tributary case that would never come up in a nontributary setting." In order to allocate accurately the time spent on each claim, this counsel reviewed all of his firm's billing statements, covering attorney fees and expenses, and

> went through line by line, item by item, for every month and every year since the inception of this litigation and made a determination of what time I felt was fairly attributable to our work on the tributary claim and excluded all remaining time and used that to come up with a total number of hours and a total amount of expenses.

As a result of this review, he determined that fifty-eight percent of the attorney fees was attributable to the tributary claim. The attorney for Rio Grande Water Conservation District testified that he too went through the bills submitted by his firm to the District from 1987 through 1991 in order to identify those attorney fees and expenses related to the tributary claim.

Expert witness fees and expenses were allocated in a similar fashion. The objectors' attorneys testified that those experts involved in aspects of both the tributary and the nontributary claims were asked to itemize their monthly bills and provide a breakdown of costs they

considered attributable to the tributary and nontributary claims, and that they did so. In most instances, documents in the form of letters, bills, and/or affidavits from expert witnesses were admitted to support the attorney testimony.

Although all these allocations were made after the fact, they nonetheless provide support for the court's award determinations. The trial court was provided with an adequate evidentiary basis to find as it did that the objectors' allocations were adequate. The Tenth Circuit Court of Appeals, in a case involving an application for attorney fees and costs under the Civil Rights Attorney's Fees Award Act, recognized:

> [S]ome lawyers will not have kept contemporaneous time records. We do not forbid, retrospectively, the use of reconstructed time records and do not demand that the reconstructed hours be arbitrarily reduced.

*Ramos v. Lamm*, 713 F.2d 546, 553 n. 2 (10th Cir.1983). In a number of other cases as well, reconstructed time records have been held adequate to establish time expended. *See Pawlak v. Greenawalt*, 713 F.2d 972, 978 (3d Cir.), *cert. denied*, 464 U.S. 1042, 104 S.Ct. 707, 79 L.Ed.2d 172 (1984); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir.1983); *Johnson v. University College*, 706 F.2d 1205, 1207 (11th Cir.1983), *cert. denied*, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *Weber v. Weinberger*, 651 F.Supp. 1379, 1393 (W.D.Mich.1987). Here, the contemporaneous time records existed and were presented to the court; only the relevant allocations had to be supplied in part by estimates. None of the objectors realized at the time the records were kept that AWDI would later be

required to pay the attorney fees and expenses and that division by issue would be necessary, and AWDI claims no bad faith on the part of the objectors in this case.

"It is elementary that the trier of fact can look to either testimony or exhibits which have been admitted into evidence for the facts upon which to base his decision." *Hartman v. Freedman*, 197 Colo. 275, 280, 591 P.2d 1318, 1321 (Colo.1979). Based on our own review of the record, we conclude that the evidence, including billing records and testimony concerning allocation of time and expenses, was sufficient to permit the trial court, applying the proper standard, to allocate fees and expenses between those that were allowable and those that were not. We therefore sustain the trial court's allocation.

b. *Scope of Work Performed in Defense of Tributary Claim*

AWDI contends that some of the attorney fees and expenses incurred by the objectors and attributable to the defense of the tributary claim were unnecessary or excessive. As principal support for that contention, it presented the testimony of two experienced natural resource attorneys at the fees hearing. The first expressed the opinion that some of the matters the objectors investigated, in particular the issue of potential injury to vested water rights, should have been deferred until after the court determined whether the water was tributary. Furthermore, in that expert's opinion, the objectors are not entitled to recover any costs of initiated discovery. He asserted that because the burden of proving absence of injury and sufficiency of water supply is on the applicant,

the objectors' role is simply to stand back and take issue with what an applicant has presented, or request more information. Accordingly, any investigation beyond this would be inappropriate or a luxury and should not be the subject of compensation.

The trial court, however, did not accept this view of the scope of activity reasonably to be conducted by objectors to an application for determination of water rights. The trial court properly rejected this passive model of an objector's role, pointing out the need for evidence from both sides in order to arrive at a correct resolution and the practical need or advantage for an objector to resist an adjudication of a water right in the first instance by demonstrating that an applicant cannot satisfy the criteria for establishment of such a right.

AWDI's second expert witness on the excessive scope issue asserted that the amount of fees and expenses to be reimbursed should be reduced because the objectors failed to mitigate those fees and expenses. He contended that the objectors realized early in the litigation that no water contracts had been entered into between AWDI and any prospective beneficial users of the water. According to that expert, because such a defect is fatal to the application for determination of a tributary water right in this case,[44] the objectors should have moved for summary

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[44] In order to obtain a decree for a conditional water right, an applicant must demonstrate an intent to appropriate. Where the applicant is seeking to appropriate for the future needs and uses of others, it must present sufficient evidence to demonstrate their commitment to actual beneficial use of the water. "[M]ere negotiations with other municipalities clearly do not

judgment on the tributary claim, and they should not now be compensated for the "unnecessary" fees and expenses incurred subsequent to the date at which this motion should have been made. The water contracts issue, however, was not relevant to some of the beneficial uses claimed by AWDI.[45] The trial court considered the expert's opinion and in its written order for attorney fees and expenses specifically found that "there would have been genuine material fact [sic] at issue that would have required the Court to deny a motion for partial summary judgment on the tributary claim."[46] On this record, we cannot say that the objectors incurred unnecessary expenses because they did not seek partial summary judgment on the tributary claim.

Lastly, AWDI contends that the number of experts hired by the objectors to analyze and review the State's ground water computer modeling was excessive and therefore wasteful. Based upon our review of the record of the fees hearing, we are satisfied that the trial judge

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rise to the level of definite commitment for use required to prove the intent here required." *Colo. River Water Cons. Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 417, 594 P.2d 566, 568 (1979).

[45] The expert's testimony does not take account of the fact that AWDI proposed to use some of the water to be produced for irrigation of its own lands in the Valley, a use not subject to the *Vidler* requirements.

[46] Moreover, the witness himself testified that the date on which it should have been clear to the objectors that no contracts existed was no sooner than November of 1990, four years after the start of litigation and well after most of the attorney fees and expenses at issue had been incurred.

adequately considered the reasonableness and the necessity of the services provided by those experts.

For the foregoing reasons, and because our own review of the record discloses no suggestion that the objectors sought recovery for work not necessary to their defenses, we affirm the trial court's rejection of AWDI's arguments that the objectors incurred unnecessary fees and expenses by reason of the scope of their efforts in defending against the tributary claim.

c. *Reasonableness of Amounts Charged for Fees and Expenses*

The United States Supreme Court has stated that while " 'there is no precise rule or formula' for determining attorney's fees," *Evans v. Jeff D.*, 475 U.S. 717, 735-36, 106 S.Ct. 1531, 1542, 89 L.Ed.2d 747 (1986) (quoting *Hensley*, 461 U.S. at 436, 103 S.Ct. at 1941), the proper starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939 (considering fee to be awarded under 42 U.S.C. § 1988); *accord Ramos*, 713 P.2d at 552 (same); *Spensieri*, 804 P.2d at 270 (estimate of a reasonable attorney fee involves a calculation of the "lodestar" amount, which represents the number of hours reasonably expended multiplied by a reasonable hourly rate); *see Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo.1981).

AWDI has not challenged the amount of time spent by attorneys for the objectors on particular tasks as excessive. Instead, it has contended that the usefulness of the tasks themselves was not limited to the tributary claim

and that the scope of the work performed was not reasonable. These objections were rejected earlier in the immediately preceding sections of this opinion.

AWDI also has not objected to the reasonableness of the hourly rate charged by attorneys from private law firms. It has stipulated that $100 per hour, the rate charged, was a reasonable rate for those attorneys. Nor has AWDI objected to the rates charged by lawyers for the United States, who were on the staff of the United States attorney. AWDI does object to the rates at which the State's attorneys, who were on the staff of the State attorney general, billed their time. The State claimed, and the court awarded, $100 per hour for attorney time and $50 per hour for the time of legal assistants. AWDI objects to this award because the interdepartmental billings for services of attorneys and legal assistants on the staff of the State attorney general at the relevant time were based on hourly rates of $40.75 and $27.44 respectively. AWDI argues that the state employees cannot be awarded more than these hourly rates. We disagree.

Rule 41(a)(2) expressly gives the court power to grant a motion for dismissal under the rule upon such terms and conditions as the court deems proper. Thus, determination of the terms and conditions of dismissal under 41(a)(2) is discretionary with the trial court and will not be disturbed on review absent an abuse of that discretion. *Stevedoring Servs. of America v. Armilla Int'l*, 889 F.2d 919, 921 (9th Cir.1989); *Moore v. C.R. Anthony Co.*, 198 F.2d 607, 608 (10th Cir. 1952); *Bishop v. W. American Ins. Co.*, 95 F.R.D. 494, 495 (N.D.Ga.1982); *see American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir.1963) (trial court has discretion to impose terms and conditions); *see also*

*Powers*, 832 P.2d at 1102. Typically, courts impose as a term and condition of dismissal a requirement that the plaintiff pay the defendant the expenses incurred in defending the suit, which usually include reasonable attorney fees. *Marlow v. Winston & Strawn*, 19 F.3d 300 (7th Cir.1994); *Mortgage Guaranty*, 904 F.2d at 300; *LeCompte*, 528 F.2d at 603; *Bath Iron Works Corp. v. Parmatic Filter Corp.*, 736 F.Supp. 1175, 1178 (D.Me.1990). The award of attorney fees must be reasonable, and "[t]he determination of reasonableness is a question of fact for the trial court and will not be disturbed on review unless it is patently erroneous and unsupported by the evidence." *Harman v. Freedman*, 197 Colo. 275, 281, 591 P.2d 1318, 1322 (1979) (fees awarded pursuant to § 8-4-114, C.R.S. (1973)); *accord Rifkin v. Steele Platt*, 824 P.2d 32, 35 (Colo.App.1991); *Spensieri*, 804 P.2d at 270; *Greeley Nat'l Bank v. Sloan*, 677 P.2d 409, 412 (Colo.App.1983). The trial judge considered the reasonableness of fees issue and expressly determined that "[one] hundred dollars an hour by water lawyers . . . is an extremely minimum rate and eminently reasonable, whether it be in the public or the private sector."

We have previously held that attorneys are entitled to an award of reasonable attorney fees at market rates for attorneys of comparable skill, experience and reputation:[47]

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[47] As for legal assistants, *see Missouri v. Jenkins*, 491 U.S. 274, 287-88, 109 S.Ct. 2463, 2471-72, 105 L.Ed.2d 229 (1989), in which the Supreme Court concluded that the district court properly compensated the work of paralegals at market rates rather than at their cost to attorneys.

> If the fee requested is reasonable in light of community standards and the other criteria to be considered by the court, it is not appropriate for a court to take into consideration what a major client may pay the attorney on an hourly basis or the possible absence of overhead expenses comparable to those borne by lawyers in private practice.

*Mau*, 638 P.2d at 780 (attorney fees awarded to tenant's attorney pursuant to section 38-12-103(3)(a), 16A C.R.S. (1973) (citation omitted)); *see also Spensieri*, 804 P.2d at 271 ("The criterion for the court is not what the parties agreed, but what reflects reasonable value for services rendered."). Numerous other courts have held that fees awarded are to be "based on reasonable billing rates in the relevant community, not net hourly earnings." *Hamilton v. Daley*, 777 F.2d 1207 (7th Cir.1985) (fees awarded to government attorneys defending against frivolous civil rights suit; fact that attorneys are public servants who will not personally receive any fees awarded makes no difference).[48] Therefore, we find that the hourly rate awarded to the State of Colorado for attorney fees and paralegal services was not an abuse of discretion.

AWDI also contends that the amounts allowed for expert witnesses and consultants were unreasonable or

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[48] *See* cases involving the federal civil rights statute, 42 U.S.C. § 1988 (1982). The federal courts have consistently held that public interest attorneys are entitled to an award of reasonable attorney fees based upon the market rate within the community. *See Blum v. Stenson*, 465 U.S 886, 892-96, 104 S.Ct. 1541, 1545-48, 79 L.Ed.2d 891 (1984); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir.1983); *see also Oten v. Colorado Bd. of Social Services*, 738 P.2d 37, 42 (Colo.App. 1987).

unsubstantiated. AWDI points to no particular bills as unreasonable in amount. The objectors documented these fees with billing records, expert testimony summaries, and testimony by attorneys and state personnel as to the nature of the work performed, the method of allocation of expenses between the tributary and nontributary claims and the reasonableness of the fees charged. There was evidence, although general in nature, that the fees were reasonable for the services performed.

The trial court did not simply award to the objectors all attorney fees and expenses requested. Instead, it examined the claims made and assessed the reasonableness and substantiation given for the claims. The trial judge disallowed: (1) the state's claim for reimbursement of $9,000 for court reporter fees; its claim of $173,818 for compensation for nonlegal employees of the Division of Wildlife and the State and Division Engineers' Offices; and its claim of $1300 for a bat detector; (2) the "unsubstantiated or unverified claims of Cotton Creek Ranch, Dennis Felmlee and Timothy Lovato; (3) compensation for time and attorney fees spent post-trial in preparing the fee application; and (4) certain room and board expenses. In addition, the trial court, "out of an abundance of caution and so as to preclude any concerns about vagueness, overlap, possible redundancy or questionable expense," discounted the attorney fee and expense claims under Rule 41(a)(2) by ten percent.

> In similar cases with voluminous fee applications, courts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application. *See Copeland v. Marshall,* 641 F.2d 880, 903 (D.C.Cir.1980) (en

> banc) (22% cut); *Ross v. Saltmarsh*, 521 F.Supp. 753, 761-62 (S.D.N.Y.1981) (5% and 10% cuts), *aff'd mem.*, 688 F.2d 816 (2d Cir.1982); *Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054, 1056 (S.D.N.Y.1977) (10% cut), *aff'd mem.*, 578 F.2d 1368 (2d Cir. 1978). These courts have endorsed percentage cuts as a practical means of trimming fat from a fee application.

*New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir.1983). We sustain the trial court's determination of the amounts to be awarded for attorney fees and expenses attributable to defenses of the tributary claim.

3. *Summary*

The trial judge concluded that most of the attorney fees and expenses incurred by the objectors in defending the tributary claim "were both necessary and reasonable." Having participated in each stage of the proceeding, the trial judge was capable of understanding what was reasonably expended in attorney fees. *San Juan Products, Inc. v. San Juan Pools of Kansas, Inc.*, 849 F.2d 468, 476 (10th Cir.1988); *see also Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir.1986) (since the trial court saw attorney's work first hand, it has far better means of knowing what is just and reasonable than does the appellate court). It also heard the testimony of expert witnesses, and was familiar with much of their work product in the form of exhibits.

> A determination of reasonableness is a question of fact for the trial court and 'will not be disturbed on review unless it is patently erroneous and unsupported by the evidence.' If . . . the

> statute pursuant to which an award of attorney fees is made, does not provide a specific definition of 'reasonable,' then such compensation should be determined in light of all circumstances for the time and effort reasonably expended by the prevailing party's attorney.

*Spensieri*, 804 P.2d at 270 (citations omitted).

The trial judge made findings and conclusions to support his determinations. The attorneys for the objectors testified that they coordinated efforts among themselves so as to minimize duplication of effort and expenses. The trial judge found that they "were very careful to minimize expenses and eliminate duplication of effort." The trial court also found that many of the early expenses incurred by the objectors were the result of AWDI's failure of timely and complete compliance with discovery requests. All these findings, though general, are sufficient and supported by the record.

We conclude that AWDI's challenge to the amount of attorney fees, expenses, and costs awarded as a condition to voluntary dismissal of the tributary claim under C.R.C.P. 41(a)(2) must fail.

### E. *Whether Excessive Costs were Awarded Incident to Dismissal of the Nontributary Claim*

AWDI also challenges the amount of costs awarded to the objectors under C.R.C.P. 54(d), taking issue with the sufficiency of the evidence and the judge's findings, and asserting abuse of discretion in setting the amount of the award.

C.R.C.P. 54(d) provides, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . . " Section 13-16-122 lists those items includable as costs.[49] The objectors submitted bills of costs under C.R.C.P. 54(d) of $473,091.31 for costs related to the nontributary claim, and the trial court awarded that entire amount.

The principal costs claimed under Rule 54(d) were for expert witness fees. "[C]harges for expert witnesses approved pursuant to section 13-33-102(4)" are expressly allowed as costs under section 13-16-122(1)(e). Section 13-33-102(4), 6A C.R.S. (1987), provides:

> Witnesses in courts of record called to testify only to an opinion founded on special study or experience in any branch of science or to make scientific or professional examinations and state

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[49] Section 13-16-122, 6A C.R.S. (1987), provides:

*Items includable as costs.* (1) Whenever any court of this state assesses costs pursuant to any provision of this article, such as costs may include:

(a) Any docket fee required by article 32 of this title or any other fee or tax required by statute to be paid to the clerk of the court;

* * *

(e) The witness fees, including subsistence payments, mileage at the rate authorized by section 13-33-103, and charges for expert witnesses approved pursuant to section 13-33-102(4);

(f) Any fees for exemplification and copies of papers necessarily obtained for use in the case;

* * *

(j) Any item specifically authorized by statute to be included as part of the costs.

> the result thereof shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required.

Rio Grande Water Conservation District claimed $257,227.00 in expert witness fees, the United States claimed $126,640.13, and the State claimed $65,810.94. AWDI contends that the award of these fees was improper because "there was no evidence of the reasonableness or necessity of the work or the expert testimony." This is not so.

AWDI presented a set of expert witnesses who offered opinions, supplemented by numerous exhibits, concerning the complex geologic and hydrologic features of the San Luis Valley, including the movement of underground water, and the effect of pumping underground water on surface streams and waters tributary thereto. This testimony was complemented by a computer model, and expert testimony was offered concerning the design, operation, and results achieved by use of the model. All of this evidence was offered in support of AWDI's claim that the withdrawal of underground water in the quantities sought in its amended application would not produce effects inconsistent with the classification of the water as nontributary under the statutory definition in section 37-90-103(10.5) 15 C.R.S. (1990). In response to this evidence, the objectors introduced experts and a computer model developed by the State in an effort to discredit the picture of the geologic and hydrologic characteristics of the Valley drawn by AWDI's experts and the validity of AWDI's computer analysis, all directed to showing that the statutory test for nontributariness was

not satisfied. The evidence was highly technical and in many instances sharply conflicting. Ultimately, the trial judge concluded that AWDI had not successfully established that the test for nontributariness had been met.

The judge was present at the trial and therefore could evaluate first hand the necessity of each witness's testimony. *See Leadville Water Co. v. Parkville Water Dist.*, 164 Colo. 362, 367, 436 P.2d 659, 661 (1967). Furthermore, during the three day evidentiary hearing, billing statements and testimony were offered to demonstrate that the witness fees requested were both necessary and reasonable. Because of the existence of all the above support, the *Fenton* case, relied upon by applicants for their contention that a claim for "lump sum witness fees" is improper, is inapposite. *See Fenton v. Fibreboard Corp.*, 827 P.2d 564, 569 (Colo.App.1991) *aff'd in part and rev'd in part on other grounds* by *Fibreboard Corp. v. Fenton*, 845 P.2d 1168 (Colo.1993). The party requesting fees in *Fenton* provided no documentation indicating a reasonable basis upon which the sums requested were calculated, nor were the actual sums expended for the witnesses' services shown. *Fenton*, 827 P.2d at 569.

Pursuant to section 13-33-102(4), 6A C.R.S. (1986), courts may grant witness fees to experts, testifying as such, in such amounts as they deem proper. *Denver Joint Stock Land Bank v. Board of County Comm'rs*, 105 Colo. 366, 372, 98 P.2d 283, 287 (1940); *accord Lamont v. Riverside Irr. Dist.*, 179 Colo. 134, 142, 498 P.2d 1150, 1154 (1972) (assessment of expert witness fees is addressed to the sound discretion of the trial court) (1972); *Leadville Water Co.*, 164 Colo. at 367, 436 P.2d at 661 (1967) (same). The court is authorized, in fixing an expert's fee, to consider

not only the time spent in court but also the time spent by the expert in preparation for trial, *Yeager Garden Acres, Inc. v. Summit Constr. Co.*, 32 Colo.App. 242, 245-46, 513 P.2d 458, 460 (1973). In addition, allowances awarded any include travel, ordinary witness fees, food, and lodging expenses. *Leadville Water Co.*, 164 Colo. at 366, 436 P.2d at 661. The trial judge here determined that the entire amount requested by the objectors under Rule 54(d) should be awarded. This was not an abuse of discretion. The award was amply supported by billing statements and expert testimony summaries, as well as testimony concerning the nature and purpose of the services upon which the witness fees were based and the manner by which they were determined. "When we have before us the finding of a trial judge who had the opportunity to evaluate the services of the experts based upon all the evidence before him and arrive at a fair conclusion of their reasonable worth, we do not interfere with his finding." *Leadville Water Co.*, 164 Colo. at 367, 436 P.2d at 661.

Some of the miscellaneous expenses that the court awarded as costs are not listed in section 13-16-122. AWDI asserts that any items not included within the definition of costs under that section or otherwise allowed by statute or rule may not be awarded, and insists that the trial court's award to the United States of $16,873.52 for setting up an office in Alamosa, including leasing office furniture and equipment, was therefore unauthorized. It also asserts that the court's award to the Rio Grande Water Users of $5,000 for photocopying expenses and $1,500 "for postage, for messengers, for mileage, and telephone," was improper for the same reason. As to "miscellaneous" expenses, we have held that:

> The list of expenses that may be awarded as costs under section 13-16-122 . . . is illustrative and not exclusive. *Church v. American Standard Ins. Co. of Wisconsin*, 764 P.2d 405, 406 (Colo.App.1988). In general, absent a specific prohibition, the trial court has discretion over the awarding of costs. *Id.; see Rossmiller v. Romero*, 625 P.2d 1029, 1030 (Colo. 19981).

*Cherry Creek School District #5 v. Voelker*, 859 P.2d 805, 813 (Colo.1993) (quoting *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936, 940 (Colo.1993)). *See also* 6 James Wm. Moore et al., *Moore's Federal Practice* ¶ 54.70[5] (2d ed. 1993):

> In an action tried to the court, the court has a large discretion in admitting in evidence all pertinent matters which in the court's view would expedite the trial and which would give the court and the parties a clear conception of the points in issue; and may allow as costs the actual and reasonable expenses attendant thereto, although no express statutory enactment so provides.

Given logistical difficulties presented by the location and duration of the trial and the extensiveness of the exhibits, we conclude the trial court was within its discretion in allowing costs to the United States for establishing a temporary office in Alamosa. We also affirm the award to Rio Grande Water Users for photocopying and other miscellaneous expenses.[50]

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[50] AWDI cites a decision of the Colorado Court of Appeals, *Shultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo.App.1986), in which the court disallowed the award of expenses incurred for photocopies, blueprints, long distance phone calls, and postage as costs because "[t]here is no statutory authorization for

In summary, we reject AWDI's challenges to the award of costs under C.R.C.P. 54(d).

VII. *Conclusion*

For the foregoing reasons the judgments of the District Court for Water Division 3 are affirmed.

SCOTT, J., does not participate.

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including these items as part of the costs." *Id.* at 150. That case has since been criticized in *Perkins v. Flatiron Structures, Co.*, 849 P.2d 832, 836 (Colo.App.1992). In that later case, the court of appeals pointed out that § 13-16-122(1)(f) expressly authorizes an award for copies of papers necessarily obtained for use in the case. AWDI does not contend that the photocopies were not necessarily obtained for use in this case. It was therefore within the discretion of the trial court to award photocopying expenses. *See id.* at 836.

DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86-CW-46

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**MEMORANDUM AND ORDER OF PARTIAL SUMMARY JUDGMENT DISMISSING THE APPLICANTS' SPANISH OR MEXICAN AND FEDERAL LAND GRANT CLAIMS**

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF:
AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

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This matter came on before the Court on the Motion for Partial Summary Judgment Dismissing the Applicants' Spanish or Mexican and Federal Land Grant Claims filed by the Objectors Rio Grande Water Conservation District, for itself and on behalf of the Joint Objectors[1], the Rio Grande Water Users Association, and the United States of America (collectively "Objectors"). The State Objectors, constituting the State Engineer and Division Engineer for Water Division 3, the Colorado Division of Wildlife, and the Colorado Water Conservation Board, joined in the Objectors' motion. Having reviewed the

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[1] The "Joint Objectors", who are appearing jointly with the Rio Grande Water Conservation District for purposes of this case, include the Conejos Water Conservancy District, San Luis Valley Water Conservancy District, San Luis Valley Irrigation Well Owners, Inc., the City of Alamosa, the City of Monte Vista, the Town of La Jara, the Town of Crestone, Saguache County, and Rio Grande County.

briefs, heard the arguments of counsel and being fully informed in the premises the Court rules as follows:

On December 31, 1986, American Water Development, Inc., the Baca Ranch Company, and the Baca Corporation ("Applicants") jointly filed an application for the determination of their right to withdraw 200,000 acre-feet of groundwater annually from the aquifers underlying land known as the Luis Maria Cabeza de Baca Grant No. 4 and certain other lands near the towns of Moffat and Villa Grove (hereinafter referred to as the "Application").

The Applicants assert four alternate claims for relief. Claim Nos. 2 and 3 of the Application, which Objectors' motion and this Memorandum and Order address, assert an absolute right of ownership to groundwater underlying the Baca Grant No. 4 arising from an alleged grant under Spanish or Mexican law, or alternatively, from an absolute grant made by the United States.[2] These land grant claims are asserted by the Applicants to exist entirely independent of Colorado's constitutional and statutory system for allocating its water resources. The Objectors submitted by their motion that the land grant claims should be summarily dismissed as being without basis.

The genesis of the Applicants' land grant claims can be summarized as follows. On February 2, 1848, the United States and the Republic of Mexico entered into the

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[2] For purposes of their motion only, the Objectors assume arguendo that the Applicants own those portions of the Baca Grant No. 4 subject to the Application.

Treaty of Peace, Friendship, Limits, and Settlement, February 2, 1848, United States-Mexico, 9 Stat. 922, T.S.No. 207 ("Treaty of Guadalupe Hidalgo"). Through the Treaty of Guadalupe Hidalgo, the United States acquired sovereignty over certain regions of Mexico north of the Rio Grande, including the territory of New Mexico. *Id.* Article VIII of the Treaty provided that after cession the United States shall respect the property held by Mexican citizens in the ceded territory. *Id.* at 929-930. All lands acquired by the United States under the Treaty that had not been privatized at the date of the Treaty became part of the federal public domain with the United States as proprietor. *See United States v. Sandoval*, 167 U.S. 278, 296-97, 42 L.Ed. 168, 17 S.Ct. 868 (1897).

Prior to the Treaty, the antecedent sovereigns in the territory of New Mexico had made grants to two separate parties of a tract of land known as the "Vegas Grandes," located in what is now the State of New Mexico. The first grant was to Luis Maria Cabeza de Baca, on behalf of himself and seventeen of his male children, based upon a petition dated January 6, 1821. A subsequent grant was made to a group of settlers headed by Juan de Dios Maese, based upon a petition dated March 20, 1835. See Exhibit A to the Letter from the Secretary of the Interior communicating documents in relation to private land claims in New Mexico, H.R. Exec. Doc. No. 14, 36th Cong., 1st Sess. (1860) at 42-45 (hereinafter "Exec. Doc. No. 14"). The Baca family left the Vegas Grandes. The Vegas Grandes was eventually settled upon by several hundred families and became known as the town of Las Vegas. *See* S. Rep. No. 228, 36th Cong., 1st Sess. (1860).

The Act of July 22, 1854 established a process by which Congress would become the final arbiter of land claims in the territory of New Mexico, including the Vegas Grandes. *See* Act of July 22, 1854, Ch. 103, 10 Stat. 308 (1854); *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. (3 Otto) 644, 23 L.Ed. 998 (1877); *see* Act of July 21, 1860, Ch. 167, 12 Stat. 71, 71-72 (1860) ("Act of 1860").

In accordance with the process established by the Act of 1854, the Surveyor-General of New Mexico reported to Congress that the Vegas Grandes had been separated from the federal public domain by either the grant to the Baca family or the competing grant to the town. He made no recommendation as to which of the rival claims should be confirmed or as to who had the right to the property, and instead referred that issue to Congress for such action as it deemed necessary and proper. *See* Exec. Doc. No. 14 at 45. After the Senate Committee on Private Land Claims reported that the Baca heirs had "expressed a willingness to waive their older title in favor of the settlers [of the town of Las Vegas], if allowed to enter an equivalent quantity of land elsewhere within the Territory," S. Rep. No. 228, 36th Cong., 1st Sess. (1860), Congress proceeded to resolve legislatively the competing claims. By the Act of 1860, Congress confirmed title to the Vegas Grandes in the town of Las Vegas, accepted the waiver by the Baca heirs, and allowed them to select an equal quantity of vacant land, not mineral, in the territory of New Mexico. *See* Act of 1860, §§ 3 and 6, 12 Stat. at 71-72; Exec. Doc. No. 14 at 2. Such land was to be selected by them in square bodies not exceeding five in number. *See* Act of 1860, § 6, 12 Stat. at 72. On December 12, 1862

the Baca heirs filed with the Surveyor-General of New Mexico one of the five locations of land. This selection was in the San Luis Valley and was referred to as the Baca Grant No. 4. *See Shaw v. Kellogg*, 170 U.S. 312, 315, 42 L.Ed. 1050, 18 S.Ct. 632 (1898). This land was surveyed in 1863, and in 1864 the title passed, pursuant to the Act of 1860, to the Baca heirs. *Id.* at 320-22, 342-43.

The Objectors contend that the Baca Grant No. 4 is not and never has been a Spanish or Mexican land grant, but rather it was conveyed by Congress out of the federal public domain to the heirs of Luis Maria Cabeza de Baca in settlement of their disputed and unconfirmed claim to a Spanish or Mexican land grant in New Mexico. It is their position that the Applicants' title has no attributes of a Spanish/Mexican land grant and that, instead, whatever rights they may have must be based on the Act of 1860 which authorized the conveyance of the Baca Grant No. 4 from the federal public domain to the Baca heirs. The Objectors submit that the terms of the conveyance of the Baca Grant No. 4 pursuant to the Act of 1860 did not include ownership of groundwater, and that as with other federal grants of public domain, water rights associated with such conveyances were determined by the law of the state or territory in which the lands lay. It is their position that, under the laws existing when the Baca heirs' took title to the Baca Grant No. 4, ownership of the land did not include ownership of the groundwater lying thereunder.

The Applicants argue that Congress did confirm the Baca heirs' claim to a Spanish/Mexican land grant. It is their position that although Congress gave the title of the Vegas Grandes to the town of Las Vegas and gave the

Baca heirs the right to select alternative land instead of the Vegas Grandes, Congress acknowledged that title to the alternative land so selected derived from the antecedent sovereign, and that land, therefore, had all the attributes of a land grant from an antecedent sovereign. According to the Applicants, ownership of the Baca Grant No. 4 therefore included ownership of all groundwater lying thereunder, notwithstanding the law existing at the time title to the land passed to the Baca heirs. It is also their position that, regardless of any limitations on Spanish/Mexican land grant water rights, by the Act of 1860 the federal government conveyed to the Baca heirs its title to all water underlying the Baca land. Finally, they contend that even if the Baca Grant No. 4 were a conveyance from the federal public domain and water rights were determined by local law and custom, the question of local law and custom existing at the pertinent time presents a question of fact and, therefore, summary judgment thereon would be improper.

The Court concludes that Claim Nos. 2 and 3 of the Application are ripe for summary judgment, in that there are no disputed issues of material fact that must be resolved to decide the motion, and the issues presented are solely questions of law and not fact. The Court concurs with the Objectors' position as set forth in their briefs, and rejects the Applicants' analysis. For this reason, and for all of the reasons stated by the Objectors in their briefs, it is hereby ordered that the Applicants' Claim Nos. 2 and 3 be and hereby are DISMISSED.

IT IS SO ORDERED this 5th day of July, 1990.

BY THE COURT:

/s/ Robert W. Ogburn
ROBERT W. OGBURN
Water Judge
Water Division No. 3
District Court
State of Colorado

DISTRICT COURT
WATER DIVISION 3
STATE OF COLORADO
Case No. 86-CW-46

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PENDING MOTIONS

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY

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These matters came on for hearing on Thursday, July 5, 1990, at 9:00 a.m., in the courtroom, Alamosa County District Court, Alamosa, Colorado, before the HONORABLE ROBERT W. OGBURN, Judge of Water Division 3.

APPEARANCES:

JACK F. ROSS, DAVID C. HALLFORD, and JEFFERSON V. HOUPT, Attorneys at Law, SAUNDERS, SNYDER, ROSS & DICKSON, 707 – 17th Street, Suite 3500, Denver, Colorado 80202, appearing on behalf of American Water Development, Inc., The Baca Ranch Company, and The Baca Corporation.

JOHN CARLSON and WILLIAM A. PADDOCK, Attorneys at Law, CARLSON, HAMMOND & PADDOCK, 1700 Lincoln Street, Suite 3900, Denver, Colorado 80203, appearing on behalf of Rio Grande Water Users Association.

ROBERT F. HILL, DAVID W. ROBBINS, and WENDY H. BLOCK, Attorneys at Law, HILL & ROBBINS, 1441 – 18th Street, Suite 100, Denver, Colorado 80202, appearing on behalf of Rio Grande Water Conservation District.

LINDA E. WHITE, Assistant Attorney General, Department of Law, State of Colorado, 1525 Sherman Street, Third Floor, Denver, Colorado 80303, appearing on behalf of the State of Colorado.

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[p. 118] THE COURT: If I can share with counsel and the audience a perception of history – and I recognize this is not part of this case. This is not evidence, but still I think it might be interesting in trying to understand this whole land grant question.

Mr. Ross talked about the interpretation of history and, of course, history is interpreted. The romanticization of western history that most of us are familiar with is being challenged today.

Today, historians with our present environmental concerns are beginning to talk about the ravaging and despoilment of the western landscape in the 19th Century by the eastern settlers that came into this part of the country, a different perspective perhaps, an interpretation, and we've also, I think, tended to romanticize the concept of Spanish land grants, but I'd like to share with you what one historian, Howard Roberts Lamar, has to say about Spanish land grants in his book, *The Far Southwest*, 1846 to 1912, beginning at page 139 of his book, and I paraphrase liberally.

(Reading) From the time of the Taos Rebellion of 1847, when Governor Bent was killed, [p. 119] until 1854 when Washington finally appointed a surveyor general for New Mexico, the title to all property in the territory had lain in uneasy status.

The United States, by the Treaty of Guadalupe Hidalgo of 1848, had promised to respect New Mexican holdings, but these were enormously complicated by the existence of three kinds of grants: one to a community, usually for grazing purposes; a second to an individual for some outstanding service such as the defense against wild Indians or as a reward for settling a new area; and a third to the various Indian pueblos.

There were further complications because such grants had been variously awarded by the King of Spain, the Republic of Mexico after 1822, and the provincial governor, particularly Manuel Armijo, in the five years before the American conquest.

When Surveyor General William Pelham arrived in Santa Fe in 1854, he must have been dismayed at the task facing him. Over 1,000 claims awaited settlement, of which 197 involved large private grants.

Moreover, many of the private holders overlapped one another. Outside of California and [p. 120] possibly French Louisiana, Americans had never before dealt with such complicated land questions.

At the same time, Congress had given Pelham such elaborate and burdensome instructions that he was actually hampered rather than helped by them.

One clause, for example, written into the Act which created his post declared, quote, Until final action of Congress on such claims, all land covered thereby shall be reserved for sale or other disposal by the government, close quote.

This was the equivalent of denying the existence of a public domain in New Mexico while at the same time it guaranteed that long legal battles climaxed by Acts of Congress would characterize the history of the New Mexican land system.

A paradise for lawyers and politicians had been created. Commented William Keeler: "The claims approved by Congress were generally those with the most persistent influence on the outside and the most powerful political influence on the inside."

And as if to clinch the necessity for lawyers in land settlement, the grants in their wording were so extraordinarily vague that a claim [p. 121] could be stretched to include an estate of almost imperial size.

Despite many difficulties, including faulty, hasty and fraudulent surveys and the refusal of many distrustful Spanish American grantees to cooperate, a number of grants had been confirmed by 1857.

In the process, however, the legal profession of Santa Fe had become involved in securing titles for their clients. And there were men whom Governor E. G. Ross described as "sharp, shrewd Americans . . . possessed of some local lore and with a large amount of cheek and an unusual quantity of low cunning and astuteness."

The first chief justice, Joab Houghton, erstwhile builder of the capitol, was also an attorney for twelve claimants, among them Ceran St. Vrain.

Later in the fifties Judge John S. Watts told a Congressional committee that he was handling 43 cases.

In the rush to clear title Carlos Beaubien and Guadalupe Miranda, two of the largest claimants, decided to take no chances. They hired three lawyers; Houghton, Wheaton, and Smith.

[p. 122] The old Taos merchant's dream of empire seemed to come true when Congress confirmed the grant in 1860. In doing so, however, Congress was guided by the Mexican Colonization Law of 1824, which limited the size of the grant to eleven square leagues for each claimant.

Had Congress stuck by this ruling, the solution of the New Mexican land question would have been relatively simple, but there were too many other Spanish and Mexican laws contradicting the 1824 statute. Shrewd lawyers began to stretch their clients' holdings on this basis until, as Governor Sheldon later remarked, the grants took on remarkable "India rubber quality."

The history of the scores of land-grant cases and their role in New Mexican history might be epitomized by a brief account of the most famous and notorious of all the tracts, the Beaubien-Miranda claim, which came to be called the Maxwell Land Grant.

In 1869 Maxwell asked for a new government survey and learned that by the 1824 Colonization Law his claim was 22 leagues, or roughly 97,000 acres.

The men who purchased Maxwell's Grant had even larger plans than Beaubien, St. Vrain, or [p. 123] Lucien Maxwell had envisaged.

Acutely aware of the vagueness of the grant, they hired W. W. Griffin, United States Deputy Surveyor of New Mexico, to survey the grant as a two million acre plot – in contrast to the 97,000 acres to which Congress and Secretary of the Interior Cox had limited it to in 1869.

Without waiting for confirmation, Wilson Waddingham, an English rancher connected with the new company, went to London and sold the grant to English purchasers.

Things had gone remarkably well for these bold American and British speculators. Then in 1871 the new Secretary of the Interior, Columbus Delano, once again ruled that the grant covered only 22 leagues or 97,000 acres.

Unless the company, now busily selling $5 million worth of stock on the European market, could suspend this ruling, its fate would be that of other great land frontier schemes.

To circumvent the 1824 Colonization Law and hostile Secretaries of the Interior, the company resorted to court action and Congressional influence.

Despite all that could be done, the [p. 124] company was in bankruptcy by 1875, but the legerdemain practiced by the New Mexicans interested in the company now became more subtle than ever. Having secured a state of bankruptcy from a friendly judge, the company's claim in 1877 was sold to cover a tax debt.

The Maxwell case was reopened and a new survey was subsequently ordered at the company's behest.

The company then gave the contract to two engineering innocents. After a swift and almost meaningless survey lasting only 22 days, they filed their reports, declaring that the grant was indeed nearly two million acres in size.

On May 19, 1879, a ten-year battle ended because of favorable court decisions and land-office rulings, and Land Commissioner Williamson issued patents of ownership in excess of 1,700,000 acres.

In the realm of the remaining land grants, the methods and successes of the Maxwell Company triggered other claimants and speculators into action.

At the same time that the Maxwell purchase was being made, Colorado speculators were buying [p. 125] the Las Animas – originally Vigil and St. Vrain – grant in southeastern Colorado. The Sangre de Cristo grant – Narcisco Beaubien, and Lee – was being sold to William Blackmore, an English investor with extensive holdings in the Southwest.

In less than a year the suspect Gervacio Nolan grant went to still another British investor. Once bitten, Blackmore became interested in the Cebolla and Conejos grants and the Canon de Chama claim.

To interest Eastern U. S. and European investors, impressive brochures were printed providing a resume of the documents relating to the grants, their possibilities, and always with the opinion of some prominent lawyer.

In the decade from 1875 to 1885, the remaining unconfirmed grants continued to stretch impressively. When George W. Julian took over the surveyor general's duties in the latter year, he was shocked to find that the Canada Ancha grant, which originally had been for 130 acres – less than a quarter section – was now a claim for 375 square miles.

Others were even more spectacular: The Canon De Chama grant of 184,000 acres was increased [p. 126] by the claimants and preceding surveyor generals to 472,000 acres; the Tierra Amarilla grant was by then some 932 square miles, while the Mora claim was for a mere 1400 square miles.

Counting the Maxwell grant, some 34 claimants alone declared their holdings to be over 100,000 acres each.

The land grants had become the territory's largest industry.

Again, I emphasize that's not evidence in this case. That's an interpretation of the history of our Spanish land grants by one particular historian, but still it adds a flavor and, hopefully, an understanding as to what was going on with the Spanish land grants.

After listening to counsel argue the Spanish land grant question and the interpretation of the 1860 question involving local custom, I'm reminded of the old adage: When one has the facts, argue the facts. When one has the law, argue the law. And when one has neither, just argue.

The argument has been ably done. I am persuaded that, with respect to these issues, the Applicants have neither the facts or the law on their side.

[p. 127] Accordingly, the Court grants the Objectors' motion to summarily dismiss Applicants' claims 2 and 3 for all of the reasons argued by Objectors, rejecting all of the arguments advanced by the Applicants, and a formal order will issue as submitted by the Objectors.

We'll be in recess until 1:15 when we'll take up the remaining issues.

(Proceedings recessed at 12:15 p.m. to reconvene at 1:15 p.m.)

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86-CW-46

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**ORDER**

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

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THIS MATTER came before the Court on Applicant's Motion to Dismiss Claim Set Forth in Part IV of the Amended Application. The Court, having considered the Motion, the briefs submitted by the Applicant and Objectors, affidavits submitted by the parties, and having heard oral argument, hereby finds as follows:

1. The Application in this case was filed on December 31, 1986. By order dated October 8, 1990, the Court permitted the Applicant to file an amended application provided that there "shall be no further amendments to or supplementation of the Application herein. . . . " Both the Application and Amended Application claimed the right "to tributary ground water established by appropriation pursuant to Colorado law." Application, Part IV at 15-16; Amended Application, Part IV at 9-12 ("Tributary Claim"). Up until the time it filed this motion, the Applicant consistently represented and took actions that indicated it fully intended to proceed to trial on the Tributary Claim aspect of these applications.

2. On July 11, 1990, the Court entered a Case Management Order which, among other things, set this case for trial beginning October 15, 1991.

3. Extensive and vigorous discovery has occurred throughout the nearly five years this case has been pending. Objectors have submitted affidavits which attest to the facts that nearly 100 individuals have been deposed by the parties, nearly 100,000 pages of documents have been produced by the parties during the course of discovery, and approximately 50 individuals have been identified and deposed as expert witnesses. Objectors, the Rio Grande Water Conservation District, the Rio Grande Water Users Association, the Conejos Water Conservancy District, and the United States of America have also submitted affidavits indicating that they have incurred attorneys' fees, litigation expenses, and expert witness fees and costs in excess of two million dollars in defending against the Application and the Amended Application, including the Tributary Claim the Applicant now seeks to dismiss without prejudice.

4. Applicant filed its motion to dismiss its Tributary Claim on September 26, 1991, during the course of the pretrial conference held in this case. Applicant advanced four reasons for its filing, three of which relate to prior rulings of this Court and one of which relates to the Applicant's inability to prove a requisite element of its Tributary Claim, the existence of an agency relationship with a third party for use of the water.

5. The Applicant brought its motion pursuant to Colo. R. Civ. P. 41(a)(2). This rule states, in pertinent part, that "an action shall not be dismissed at the plaintiff's

instance save upon order of the court and upon such terms and conditions as the court deems proper." The Applicant asserts that its motion is proper under this rule.

6. The decision whether or not to grant Applicant's motion is within the discretion of this Court. *Tillery v. District Court*, 692 P.2d 1079, 1085 (Colo. 1984). As terms and conditions of the dismissal, the trial court may award costs and fees to the Objectors. *Id.* at 1084.

7. The language of Colo. R. Civ. P. 41(a)(2) and the corresponding Federal Rule are identical. The Colorado Supreme Court has relied upon federal authority to construe this rule and for other rules of procedure containing the same or similar language as the corresponding federal rule. Therefore, it is appropriate to rely upon federal authority construing that rule in ruling upon Applicant's motion. *Tillery*, 692 P.2d at 1084.

8. There are a number of factors to be considered in evaluating a Rule 41(a)(2) motion to dismiss. They include the following: (1) defendants' efforts and expense involved in preparing for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the suit; (3) the fact that the motion is filed at a critical juncture in the case; (4) plaintiff's diligence in bringing the motion; (5) insufficient explanation of the plaintiff's need to take a dismissal; and (6) prejudice resulting from uncertainty to title to real property. *See Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990); *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974); *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969); *Holbrook v. Anderson Corp.*, 130 F.R.D. 516 (D.Me. 1990).

9. Most, if not all, of the factors listed in paragraph 8 above are present here.

10. When a motion to dismiss without prejudice is filed close to the start of trial and after the defendant have been put to the expense of preparing for trial, such a motion will ordinarily only be granted upon the condition that the plaintiff reimburse the defendant for the expenses of litigation, including attorneys' fees. *McCants v. Ford Motor Co.*, 781 F.2d 855, 860 (11th Cir. 1986); *Yoffee v. Keller Industries, Inc.*, 580 F.2d 127 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Radiant Technology Corp. v. Electrovert*, 122 F.R.D. 201, 215 (N.D.Tex. 1988); *Goldlawr, Inc. v. Shubert*, 32 F.R.D. 467, 469-70 (S.D.N.Y. 1963). *See also Tillery*, 692 P.2d at 1084.

11. Voluntary dismissal under Colo. R. Civ. P. 11 is not a bar to an award of attorneys' fees made as a term and condition of dismissal pursuant to Rule 41(a)(2). Here, the Applicant proceeded under Rule 41(a)(2) and is subject to imposition of appropriate terms and conditions as part of the requested dismissal without perjudice.

12. The Court finds that absent the imposition of appropriate terms and conditions, the Objectors will suffer legal prejudice that would otherwise result from the dismissal without prejudice.

IT IS THEREFORE ORDERED as follows:

1. The Applicant's Motion to Dismiss without prejudice is granted subject to the condition that it pay to Objectors all of their attorneys' fees, expert witness fees and costs, and other fees and expenses related to the Tributary Claim.

2. A hearing to determine the amount of such fees and costs which will be ordered paid by the Applicant shall be held immediately following the trial on the non-tributary claim. The Court will at that time consider the reasonableness of those fees and costs and the necessity of those expenditures.

3. The entry of this Order shall not limit the Objectors' right to seek an award of expenses, including attorneys' fees, pursuant to Colo. R. Civ. P. 11 or for attorneys' fees pursuant to Colo. Rev. Stat. §13-17-102 (1990).

DATED: November 21, 1991 nunc pro tunc
October 10, 1991

BY THE COURT:

/s/ Robert G. Ogburn
ROBERT G. OGBURN
Water Judge
Water Division No. 3
State of Colorado

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

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REPORTER'S TRANSCRIPT

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

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The pretrial hearing in this matter commenced on Thursday, October 10, 1991, before the HONORABLE ROBERT W. OGBURN, District Judge within and for the 12th Judicial District, State of Colorado.

APPEARANCES:

FOR THE APPLICANT: JACK ROSS
WILLIAM KIRVEN
DAVID HALLFORD
THOMAS CRABB

FOR THE OBJECTORS: JOHN HILL
JIM DU BOIS
WILLIAM PADDOCK
DAVID ROBBINS
CHRISTINE KLEIN
BRAD CAMERON
FRED BAUDER

[p. 2] MORNING SESSION, THURSDAY, OCTOBER 10, 1991

(The court convened with all parties present, and the following proceedings were had:)

THE COURT: Good morning. Be seated, please. This is 86 CW 46, the AWDI application for water rights. This is a continuation of the hearing from last week. After disposing of a number of motions, the applicants filed a motion to dismiss Part IV of their tributary claim, and that hearing was continued to today. Both sides have filed briefs.

* * *

[p. 73] THE COURT: Objector in their brief in opposition to the motion to the – to dismiss the tributary claim is Dickensonian in its preliminary observations, and I guess I'd like to share that with everyone who hasn't read the brief. "Applicant does not have the right to simply abandon one of its two remaining claims on the courthouse steps on the eve of trial like an unwanted infant at the orphanage, only to be reclaimed at some later date," shades of Oliver Twist. We've got in the past a lot of the rhetoric in the briefs.

The parties have responded to my questions – the parties. The objectors have responded to my question, what were they really asking for, because quite frankly it was not clear until this morning what the objectors' position is. We now seem to have a unified position on the part of the objectors that plaintiff's or applicant's motion should be dismissed without prejudice and it will.

The question then remains should the Court impose reasonable terms and conditions along with the dismissal of Part IV of the application, and the Court concludes that

it should. I disagree with the applicant that there is somehow only some kind of legal injury or legal test that must apply. It's evident from the cases cited, concededly all federal cases, but *Tillery*, which is the touchstone in Colorado, relies on federal interpretation.

[p. 74] This is not an unusual position for our state Supreme Court to take. They have taken that position looking to federal authority on numerous occasions on numerous questions, particularly with respect to the interpretation of federal rules vis-a-vis state rules of procedure. In many instances they are identical.

It would appear that Rule 41 of the federal rules and Rule 41 of the state rules are identical. Looking at the federal authority side, it's obvious that the factors the Court was considering in evaluating a Rule 41(a)(2) motion to dismiss include the defendants' efforts and expense involved in preparing for trial, excess delay and lack of diligence on the part of the plaintiff in prosecuting the suit, the fact that the motion is filed at a critical juncture in the case, plaintiff's diligence in bringing the motion or lack of diligence, insufficient explanation of the plaintiff's need to take a dismissal, and prejudice that may result from uncertainty to title in real property.

The cases cited are in AWD – or in objectors' brief at page 8. Other matters to be considered, I think are the vigorous discovery that has occurred, plaintiff's or applicant's counsel's representations that this matter would proceed to trial on Part I and Part IV, the extent of resources defendants have spent – defendants – objectors have spent in preparing for trial and any inadequacy of applicant's proffered [p. 75] reasons.

I am satisfied that most, if not all of these situations exist. I will not attempt to simply regurgitate the history of this case at this time, but it's obvious to everyone that we have almost five years of litigation in this matter. I has been time consuming and extremely expensive on the part of both sides. As a condition to the dismissal of Part IV of the application, terms and conditions will be imposed requiring the applicant to pay to objectors, and there may be other objectors.

Off the top of my head I can think of, I think, Mr. McMillen who's sort of in and out of this case, represents several objectors. I don't know what kind of costs or expenses may be incurred there, but I don't want to limit this just to the objectors who are here present in court today. But the applicant will pay to objectors all attorney fees and expert witness fees and other fees and expenses incurred by the objectors that are otherwise appropriate during the pendency of this litigation which relate to the tributary claim.

Needless to say, this will require a hearing subsequent to the trial in this matter because we don't have all of the information yet, and it needs to be subjected to a reasonable and necessary test, and this will be done. The parties may claim, by way of an example, 2 million dollars.

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DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 96-CW-46

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TRANSCRIPT OF PROCEEDINGS VOLUME XVIII

NOVEMBER 21, 1991

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

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BE IT REMEMBERED that the above-entitled matter came on for trial on the 21st day of November 1991, before the HONORABLE ROBERT W. OGBURN, sitting in Water Division Three, Alamosa County, Colorado.

* * *

[p. 6275] THE COURT: Let's go back on the record.

Applicant's Motion for Order Granting Applicant Due Process in Form of Notice, Evidentiary Hearing, Discovery and Establishing the Issues and Procedure for the Same. That's still outstanding. You folks were going to give me a reply?

* * *

[p. 6277] Now, if your reply and your argument persuades me somehow we have to back up, fine and good; we will back up. But for the moment I'm making the assumption that your motion is going to go down in

blazing technicolor and we are going to forward, subject to the power of persuasion of your writing and oratorical skills. I'm not going to just let this thing get away from me.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86-CW-46

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TRANSCRIPT OF PROCEEDINGS VOLUME XXIX

NOVEMBER 22, 1991

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

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BE IT REMEMBERED that the above-entitled matter came on for trial on the 22nd day of November 1991, before the HONORABLE ROBERT W. OGBURN, sitting in Water Division Three, Alamosa County, Colorado.

* * *

[p. 6503] THE COURT: Motion for a jury trial is denied.

With respect to the motion for an order granting applicant due process, formal notice of evidentiary hearing, discovery establishing issues of [p. 6504] procedure for the same, the motion is denied for the most part, will be granted in limited part.

Quoting from Radiant Technology Corp. versus Electrovert USA, the Federal District Court for the Northern District of Illinois 122 F.R.D. 201 in 1988, "Rule 41(a)(2) provides that, except as permitted under Rule 41(a)(1), a district court shall not dismiss an action at the plaintiff's instance 'save upon order of the court that upon such terms and conditions as the court deems proper'.

"The basic purpose of Rule 41(a)(2) is to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced.

"Allowing the court to attach conditions to the order of dismissal prevents defendants from being unfairly affected by such dismissal.

"The decision to dismiss an action rests within the sound discretion of the district court.

"In determining whether to grant a dismissal, the principal consideration is whether the dismissal would prejudice the defendant. If a dismissal would unfairly prejudice the defendant, then the plaintiff's motion to dismiss should be denied.

"When considering a dismissal without [p. 6505] prejudice, the court should keep in mind the interests of the defendant, for it is his position which should be protected.

"The defendant must demonstrate that the dismissal will cause 'some plain legal prejudice other than a mere prospect of a second lawsuit'.

"Outright dismissal should be refused, however, when a plaintiff seeks to circumvent an expected adverse result," skipping around in the decision.

"Two factors which appear regularly to be considered, and which the court deems pertinent to the exercise of its own discretion, are the defendant's effort and expense in preparing for trial and whether there have been excessive delays or a lack of diligence on the part of the plaintiff or prosecuting the case."

One matter which concerns me, I don't mind saying, is that it was evident to the Court at the close of this case that if the modelers could, they would still be punching numbers out on their machines.

When this action was filed in 1986, there was some kind of a model in place, but it is evidently clear from the testimony that for the last five years everyone has been going crazy trying to bring them up to date and up to speed with more information and more data.

[p. 6506] I appreciate why you didn't like my trial management order now. I never understood it before. You wanted all the Objectors' information so you could plug it into your program with a state-of-the-art presentation, if you will; although they didn't bring the action. You brought the action. And presumably, at least I presumed, that when you filed this action, you knew what you were doing and you knew what you had.

And it's evident to me that in 1986 you didn't know what you were doing and you didn't know what you had, and I'm not sure at this point if you know what you have. One might suggest that that constitutes some form of inordinate delay.

"The first factor," continuing "includes an evaluation of the amount of discovery and the extent to which curious pretrial motions have been filed.

"A district court may reasonably impose attorney's fees and costs as a condition for dismissal where, at plaintiff's instance, the litigation will not result in a merits resolution.

"The second factor includes a determination whether there have been excessive delays or a lack of diligence on the part of the plaintiff in prosecuting the case.

"This factor incorporates an assessment [p. 6507] whether the defendant has been harmed by the delay and whether the defendant has been prejudiced by the uncertainty of pending litigation."

Applicants have characterized Radiant Technology as an aberrant decision. I don't find it to be so. I find it quite persuasive.

With respect to going back to square one, I have no intention of doing so. I entered an order back on October 10 after the Applicant requested a hearing; they got a hearing on October 10. You folks knew what Rule 41 said, that it didn't take a genius to figure out that I might consider terms and conditions. That's what Rule 41 says I may do. We talked about it at that hearing, and then you took your good, old, sweet time, 33 days, to file this particular motion.

I don't think it was timely filed, but aside from that, I don't think you are entitled to what you are seeking in that motion.

We are not going to go back and relitigate each and every imagined grievance you think that you may have suffered because you filed the motion to voluntarily dismiss your trib claim.

We will provide for procedures to determine your reasonableness and appropriateness of the claim for the award for costs and fees, including [p. 6508] attorney fees, as I've previously ruled following the federal

authority that has been presented to me, recognizing that Tillery doesn't spell out the question of attorney fees and that it's not absolutely cast in stone in the state of Colorado. Yet, we will develop law in the state of Colorado on that point.

My decision is based on the applicable federal decisions in place at this time, which I find persuasive in the absence of definitive Colorado law.

The Objectors shall file their bill of costs concerning these matters by Wednesday evening 5 o'clock. I assume you don't intend to work on Thursday. Applicants will have 30 days in which to respond. The information furnished by the Objectors' counsel will be treated as confidential and the confidentiality order in place will apply to these matters.

Objectors will have 15 days to reply – or respond – respond, reply, it's getting late. I will then set up a teleconference with counsel to set a hearing date if one is needed on these matters.

No formal discovery as contemplated by Applicants will be allowed.

MR. ROSS: I beg your pardon, but what?

THE COURT: Will not be allowed. Anything [p. 6509] further?

MR. ROSS: Yes, your Honor. I believe we would like to have a ruling on our offer of proof.

THE COURT: In what respect, Mr. Ross?

MR. ROSS: Well, we made an offer of proof. Is the Court going to accept it or deny it?

THE COURT: I thought it was implicit in my ruling that it was denied.

MR. ROSS: That's all we needed to know.

THE COURT: All right. Anything further?

* * *

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DISTRICT COURT, WATER DIVISION NO. 3, STATE OF COLORADO

CASE NO. 86CW46

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**ORDER**

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.

IN ALAMOSA, CONEJOS, COSTILLA, HINDSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

---

THIS MATTER having come on before the Court on the Applicant's Motion for a Prehearing Conference and Oral Argument on the Issue of Entitlement, and the Court having considered the responses of the Objectors and the files of this case, HEREBY ORDERS as follows:

1. The Applicant's request for oral argument on the issue of entitlement is denied. The issue of entitlement has already been determined by this Court pursuant to its Order of November 21, 1991, *nunc pro tunc* October 10, 1991. The Applicant's argument based on the grounds of pre-emption or abrogation is without merit and does not provide a basis for the Court's reconsideration of the issue of entitlement.

2. This Court will hold a hearing to determine a reasonable amount of attorneys fees and litigation related expenses, if any, to be awarded the Objectors arising from the dismissal of the tributary claim in this case. At that time the parties may present evidence they deem appropriate to the basis and reasonableness of the fees

and expenses claimed including whether any mitigation was appropriate or possible and would have reduced the fees and expenses claimed by the Objectors.

3. The Court further Orders that up to two days will be set aside for the hearing on April 21, 1992, beginning at 9:00 a.m. at Alamosa, Colorado.

DATED this 16th day of March, 1992.

BY THE COURT:

/s/ Robert W. Ogburn
ROBERT W. OGBURN
Water Judge
Water Division No. 3
State of Colorado

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

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REPORTER'S TRANSCRIPT

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF: AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

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The hearing in this matter commenced on March 16, 1992, before the HONORABLE ROBERT W. OGBURN, Water Judge within and for Water Division 3, State of Colorado.

APPEARANCES:

| | |
|---|---|
| FOR THE APPLICANT: | JOSEPH M. MONTANO |
| FOR THE OBJECTORS: | |
| RGWUA: | WILLIAM PADDOCK |
| RGWCD: | KAREN TOMB |
| STATE OF COLORADO: | BRAD CAMERON |

* * *

[p. 8] THE COURT: The applicant's request for prehearing conference and oral argument on the issue of entitlement is also denied. We've argued in one way or the other the question of entitlement, Mr. Montano, now on two or three or four occasions. I don't know. It keeps coming up, and I know you're getting into the ball game a little late on that; but up front, I've ruled that the

objectors – under the Rule 41 motion to voluntarily dismiss the tributary claim, it was conditioned without objection, at the time, on the payment – not only without objection, but the applicant conceded that the Court had the authority to award reasonable fees and costs.

There's a real question, of course, as to what reasonable fees and costs encompass. We've had lengthy discussions about the lack of state law interpreting this – the scope and depth of this under Rule 41, and I've ruled in the past that my ruling and my decision in this regard is going to be based on ample federal authority, recognizing that there's limited state authority; and until our appellate courts feel that they want to take a different tactic from the federal line of authority, which, of course, is their prerogative, I am persuaded by the line of federal authority.

* * *

SUPREME COURT, STATE OF COLORADO
CASE NO. 92SA141 AND 92SA263
Appeal from the District Court, Water Division #3, 86CW46

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**ORDER OF COURT**

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92SA141

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Appellant,

vs.

CITY OF ALAMOSA, et al.

Objectors-Appellees.

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92SA263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

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Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 6, 1994.
Justice Scott does not participate.
[SEAL]

DISTRICT COURT, WATER DIVISION 3, COLORADO
CASE NO. 86CW46

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APPLICATION FOR UNDERGROUND WATER RIGHTS OR, IN THE ALTERNATIVE, FOR THE DETERMINATION OF RIGHTS TO NONTRIBUTARY GROUNDWATER OUTSIDE OF DESIGNATED GROUNDWATER BASINS

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CONCERNING THE APPLICATION FOR WATER RIGHTS OF:
AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY,
THE BACA CORPORATION, IN SAGUACHE COUNTY.

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(Filed Dec. 31, 1986)

Summary. This application involves substantial groundwater claims for wells located on what is known as the Luis Maria Cabeza de Baca Grant No. 4 (92 deep wells), as well as those located on certain lands to the west of the grant near the town of Moffat (9 deep wells) near Villa Grove (11 deep wells). The claims are made under four *alternative* bases:

(1) Pursuant to Section 37-92-203, C.R.S., a part of what is commonly referred to as S.B.5 (1985), insofar as the water claimed may be *non*tributary;

(2) Pursuant to the *Spanish and Mexican law* as recognized and affirmed by the United States, with respect to all underground water, whether tributary or otherwise;

(3) Pursuant to the *absolute grant made by the United States,* evidenced by the Act of June 21, 1860,

with respect to all underground water, whether tributary or otherwise; and

(4) Pursuant to Section 37-92-101, C.R.S., et seq., insofar as the water claims herein may be *tributary.*

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GENERAL ALLEGATIONS

1. Name, address, telephone number of applicants:

American Water Development, Inc.
The Baca Ranch Company
The Baca Corporation
Suite 2950
1099 18th Street
Denver, Colorado 80202
(303) 294-9422

American Water Development, Inc., and the Baca Ranch Company are wholly-owned subsidiaries of The Baca Corporation, formerly First Delaware-Colorado Corporation, formerly First Colorado Corporation d/b/a First Delaware-Colorado Corporation.

2. Names of wells and permit, registration, or denial numbers:

A. Wells (hereinafter "Baca Wells") located on the Luis Maria Cabeza de Baca Grant No. 4 (hereinafter sometimes "the Grant"): BA-1 through BA-65, excepting the Moffat wells as described below; BG-1 through BG-6; BS-1 through BS-5; BI-1 through BI-25.

B. Wells (hereinafter sometimes referred to as the "Moffat Wells") located to the west of the Grant and southwest of the town of

Moffat: BA-51, 52, 53, 54, 56, 57, 60, 61 and 62.

C. Wells located in the area of Town of Villa Grove (hereinafter "Villa Grove Wells"): VG-1 through VG-11.

D. Wells in all categories are hereinafter sometimes collectively referred to as "the Wells."

3. Legal description of wells:

The legal description of the Wells are given on Exhibit A hereto. Maps showing their locations are included in Exhibit A, which is comprised of seven plates. Applicants request the right to change the location of any proposed well from the location described in Exhibit A to any point within 200 feet of the location described below without the necessity of amending this application, republishing any such change, or petitioning the Court for the reopening of any decree entered herein. Each well is claimed as an alternate point of diversion for all other wells. With respect to the claims set forth in Parts I, II, and III, below, in addition to the Wells described above, applicants may need to construct additional, supplemental, replacement, or alternate point of diversion wells to recover the entire amount of water from the Aquifer to which they are entitled. Applicants request the right to construct such additional, supplemental, replacement or alternate point of diversion wells as are necessary in order to maintain production of the amounts of water to which they are entitled by virtue of their ownership of the land.

4. A. Source: Underground water in the San Luis Valley Aquifer, herein sometimes referred to as "the Aquifer."

B. Depth: Perforated from 200 feet to 2,500. These depths are approximate and will vary according to the actual topographic locations of the wells and the saturated thickness of that part of the aquifer penetrated by each well.

5. A. Date of appropriation: April 21, 1986, applicable only to the claims set forth in Part IV, below.

B. How appropriation was initiated: Corporate resolution and field survey.

C. Date water applied to beneficial use: N/A

6. Amount claimed: 5,000 g.p.m. per well ( ) Absolute ( X ) Conditional, with respect to the claims set forth in Part IV, below. With respect to the claims in Parts I, II, and III, the rate set forth above is a nominal pumping rate and applicant requests the right to exceed the nominal pumping rate associated with each well to the extent necessary to withdraw the total number of acre feet which applicants are entitled to withdraw from each well each year.

7. If well is nontributary: (applicable only to Part I below)

A. Name of Aquifer: The San Luis Valley Aquifer, hereinafter sometimes referred to as "the Aquifer."

B. Amount claimed in acre feet annually: 200,000 a.f.

8. Proposed Use.

A. If irrigation:

(1) Number of acres historically irrigated: none from the Wells.

(2) Total number of acres proposed to be irrigated: approximately 38,000

(3) The legal description of the land irrigated: *see* Exhibit B.

(4) Area of lawns and gardens irrigated: unknown.

B. If non-irrigation, describe purpose fully:

Applicants intend to use the water which is the subject of this application as a water supply for the land, for such property as applicants may subsequently acquire and for such other property as applicants may choose to serve. The water contained in the Aquifer that is the subject of this application will be used in a unified water system, reused, successively used, and otherwise disposed of for municipal, domestic, industrial, commercial, fire protection, irrigation, stockwatering, recreation, fish and wildlife preservation and propagation, and all other beneficial uses. Said water will be produced for immediate application to beneficial use, for storage and subsequent application to beneficial use, for exchange purposes, for replacement of depletions, and for all other augmentation purposes including taking credit for all return flows resulting from the use of said water as augmentation for or as an offset against any out-of-priority tributary groundwater depletion. Applicant claims the rights set forth in this paragraph for themselves, their successors, assigns, lessees and contractors.

9. Name and address of owner of land on which the Wells are located:

The Baca Ranch Company
1099 18th Street
Suite 2950
Denver, Colorado 80202

10. Remarks:

The instant application is a claim only for that certain underground water described herein, without prejudice to any future uses, claims for or applications for surface waters or underground waters which are not claimed hereby, including additional underground waters from the Lands subject to this application. Copies of this application and the exhibits thereto may be obtained free of charge by written request to the applicants at the address set forth in paragraph 1, above.

PART I:

DETERMINATION OF RIGHTS OF NONTRIBUTARY GROUNDWATER OUTSIDE OF DESIGNATED GROUNDWATER BASINS.

11. Applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10, above.

12. This Court has jurisdiction to make "determinations of rights to nontributary groundwater outside of designated groundwater basins." Section 37-92-203, C.R.S., (as amended).

13. None of the Wells involved in this application, which are specifically described in Exhibit A, hereto, are located in a designated groundwater basin as defined in Section 37-90-103(7), C.R.S.

14. The groundwater to be withdrawn through the Wells is "nontributary groundwater" as defined in Section 37-90-103(10.5), C.R.S., set forth in pertinent part below.

> "Nontributary ground water" means that ground water, located outside the boundaries of any designated ground water basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101 (2) and 37-92-102 (1) (b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal.

15. Although the Wells are subject to the permit requirements of Section 37-90-137(4), C.R.S., applicants have not applied for permits to drill them. Prior to constructing any well pursuant to the terms of the decree entered hereon, applicant will apply to the State Engineer for a construction permit.

    a. The withdrawals claimed in this application are based upon the quantity of groundwater, exclusive of artificial recharge, underlying the land described in Exhibit C (hereinafter the "Land"), which Land is owned by Applicants or by parties who have consented in writing to Applicant's withdrawals.

    b. The withdrawals claimed in this application are based on an aquifer life of one hundred years beneath the Land, as described in Exhibit C.

16. This application will be supplemented by evidence that the State Engineer has issued or failed to issue, within four months of filing of the application in this Court, a determination as to the facts of the application. Pursuant to Section 37-92-302(2), C.R.S., the

determination shall be made by the State Engineer upon his receipt from the water clerk of a copy of the application and no separate filing or docketing with the State Engineer is required.

WHEREFORE, applicant requests that this Court enter a decree:

A. Granting the relief sought in this part of the application and determining, adjudicating and confirming applicants' rights to the nontributary groundwater contained in the Aquifer underlying the land.

B. Specifically determining as a matter of hydrological and geological fact that unappropriated groundwater in the amounts specified in paragraphs 6 and 7 is available for withdrawal by the Wells described in paragraphs 2 and 3; that no vested or decreed conditional water right will be materially injured by such withdrawals; that the withdrawal of groundwater from the Aquifer in the amounts to which applicant is determined to be entitled will not, within 100 years, deplete the flow of a natural stream at an annual rate greater than one tenth of one percent of the annual rate of withdrawal; and ordering that the State Engineer shall, therefore, issue well permits for the Wells described in paragraphs 2 and 3 at such time as the applicants apply for them.

C. Specifically determining the number of acre-feet of nontributary groundwater estimated to be available for withdrawal by the Wells described in paragraphs 2 and 3 on an average annual basis.

D. Specifically determining that applicants' full annual acre-foot entitlement of nontributary

groundwater from that part of the Aquifer underlying each parcel may be produced through any combination of the Wells described in paragraphs 2 and 3; that the pumping rates for said Wells may exceed the pumping rate specified in paragraph 6 or specified in any future determinations for designating additional wells as supplemental or alternate points of diversion, in order to produce said full acre-foot allocation of water from the aquifer; and ordering that applicants are entitled to withdraw from any combination of the Wells, including any additional, supplemental, replacement, or alternate point of diversion wells, an amount of groundwater in excess of the annual amount decreed from that part of the Aquifer underlying each parcel, so long as the sum of the total withdrawals from all of the wells in each aquifer on a parcel in any one year does not exceed the product of the number of years since the date of issuance of the original well permits or the date of entry of a decree herein, whichever occurs first, and the annual volume of water which applicants are entitled to withdraw from that part of that Aquifer underlying that parcel.

E. Specifically determining that applicants may change the location of any of the Wells described in paragraphs 2 and 3 from the locations described in paragraph 3 to any point within 200 feet of the described location without the necessity of filing any amendment to this application, republishing any such change, reopening any decree herein, or reapplying for a construction permit from the State Engineer.

F. Specifically determining that applicants have the right to use, reuse, successively use and

dispose of, to extinction, the waters which are the subject of this application in any manner whatsoever.

G. Specifically determining that the return flows resulting from the use of the water which is the subject of this application may be used to replace out-of-priority depletions under a plan or plans for augmentation.

H. Directing the State Engineer to issue permits for the Wells described in paragraphs 2 and 3 upon the request of applicants, at such time as applicants are ready to construct any of the Wells, and to grant such permits as are necessary for any additional, supplemental, replacement or alternate point of diversion wells required for applicants to withdraw the amount of nontributary water from the Aquifer to which they are entitled.

I. Specifically determining that, for the purposes of applying Section 37-90-137(10), C.R.S., the standards of Section 37-90-137(4), C.R.S., shall be applied as if the application for a permit for any additional, supplemental, replacement or alternate point of diversion well was filed on the same date as the application for a permit for the original well.

J. Ordering that the amount of water determined by the Court to be available for withdrawal by the wells described herein shall control the determination of the quantity of annual withdrawal allowed in any well permits issued by the State Engineer.

K. Specifically determining that the Applicants are the owners of the Land or that it is owned by

parties who have consented in writing to Applicants' withdrawals in accordance with Section 37-90-137(4)(b) (II) (A), C.R.S. (as amended by S.B. 5), and specifically determining that applicants have the sole right to withdraw all of the legally available groundwater in the Aquifer underlying the Land based on an Aquifer life of one hundred years.

L. Specifically determining that the nontributary groundwater which is the subject of this application shall not be administered in accordance with priority of appropriation, that no date of initiation of the withdrawal project is required, that such groundwater is not subject to the requirements of Section 37-92-301(4), C.R.S., concerning findings of reasonable diligence, and that applicant shall not be required to make application to the Court for findings of reasonable diligence regarding such groundwater.

M. Granting such other relief as the Court deems proper in this case.

PART II:

DETERMINATION OF RIGHTS TO GROUNDWATER BASED ON SPANISH AND MEXICAN LAW AS RECOGNIZED AND AFFIRMED BY THE UNITED STATES.

17. Applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10, above.

18. On January 16, 1821, for the purpose of cultivating the soil, advancing the interests of agriculture and pasturing animals, Luis Maria Cabeza de Baca ("Cabeza de Baca") petitioned the Provincial Deputation of Durango, Mexico, for a grant of unclaimed

public lands known as Las Vegas Grandes located in the Province of New Mexico and the present State of New Mexico in the vicinity of the Town of Las Vegas, New Mexico.

19. On May 29, 1821, The Provincial Deputation of Durango, Mexico, approved the petition of Cabeza de Baca. As approved, the grant contained nearly 500,000 acres of land suitable for growing crops and pasturage.

20. On October 17, 1823, the Governor of the Province of New Mexico issued an order to place Cabeza de Baca in possession of Las Vegas Grandes in accordance with the terms of Cabeza de Baca's petition. After a delay of approximately three years, Cabeza de Baca was, in fact, placed in possession of Las Vegas Grandes by the Province of New Mexico in 1826.

21. Under the laws of Spain, Colonial Spain, and the Republic of Mexico in effect at the time of the grant of Las Vegas Grandes to Cabeza de Baca, the grant vested in Cabeza de Baca, as but one of the many aspects of his property in the grant, perfect ownership of all underground water, tributary or otherwise, associated with Las Vegas Grandes. Based upon said ownership, Cabeza de Baca was entitled, at his discretion, to the absolute and undiminished use and disposition of all underground water which he was able to capture through wells located on Las Vegas Grandes.

22. In 1835, the. Republic of Mexico granted various persons substantially the same lands encompassing Las Vegas Grandes as had been granted to Cabeza de Baca in 1821. This latter grant was for the purpose of settlement and colonization of Las Vegas Grandes.

23. In 1847 and 1848, the United States and Mexico engaged in hostilities known as the Mexican/American War. That war was concluded by the Treaty of Guadalupe Hidalgo of February 2, 1848.

24. Under the Treaty of Guadalupe Hidalgo, that part of the Mexican Province of New Mexico within which the Las Vegas Grandes grant was located was ceded by the Republic of Mexico to the United States of America.

25. By its express terms, the Treaty of Guadalupe Hidalgo, like the law of nations generally, fully and inviolably protected and continues to protect all property rights of every kind belonging to Mexican citizens established within the ceded territories. This protection extended to and included all rights of Cabeza de Baca and his heirs and successors in the Las Vegas Grandes grant and specifically protected, but not by way of limitation, all property in the underground water beneath the Las Vegas Grandes grant.

26. By Act of July 22, 1854, in order to give effect to the Treaty of Guadalupe Hidalgo through the confirmation of *bona fide* grants of Spain and the Republic of Mexico, and for other reasons, the United States Congress established the Office of the United States Surveyor-General in New Mexico, Kansas and Nebraska. The Act assigned to the Surveyor-General the task of ascertaining the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico and of reporting his findings thereon to Congress for such action as Congress might take.

27. By their application dated June 19, 1855, the heirs of Cabeza de Baca, who was by this time deceased, requested the Surveyor-General to investigate and confirm as valid the Las Vegas Grandes grant to

Cabeza de Baca. The Surveyor-General did, in fact, make such investigation of the Las Vegas Grandes grant, which he designated as Land Claim No. 20, found such to be valid and recommended confirmation of said grant to Congress by his report of December 18, 1858.

28. By Act of June 21, 1860, Congress confirmed the Las Vegas Grandes grant to Cabeza de Baca as Private Land Claim No. 20. One purpose of that Act was to give effect to the requirement of the Treaty of Guadalupe Hidalgo that all property of Mexicans in the territories ceded by Mexico to the United States by the Treaty be inviolably protected.

29. The same general procedure as described above also resulted in Congress' confirmation of the 1835 colonization grant to the Town of Las Vegas.

30. To avoid the conflict anticipated between the heirs of Cabeza de Baca and the successors to the 1835 Grant due to the confirmation of both the 1821 and 1835 grants, Congress authorized, by the Act of June 21, 1860, the heirs of Cabeza de Baca to select no more than five tracts of land, sometimes referred to as replacement floats, within the Territory of New Mexico as it existed on June 21, 1860, in substitution for the 1821 Las Vegas Grandes grant to Cabeza de Baca.

31. On December 12, 1862, the Baca heirs notified the United States that the fourth of the five parcels which they had selected in replacement for the Las Vegas Grandes grant was that parcel of land now generally known as the Baca Grant No. 4 in Saguache County. The selection of this replacement float was finalized on March 18, 1864, when the United States Surveyor-General for the Territories of Colorado and Utah certified the survey of the Baca Grant No. 4. *See* Exhibit D hereto.

32. The Treaty of Guadalupe Hidalgo, the Act of June 21, 1860, and the law of nations protected and continued in force and effect in the Baca Grant No. 4 (and the other four floats) all rights of property vested in Cabeza de Baca, and in his heirs and successors, in Las Vegas Grandes. Specifically, but not by way of limitation, the Treaty, Act, and the law of nations protected and continued in the Baca Grant No. 4, their ownership of and, based upon that ownership, their right, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which they might be able to capture through wells located on the Baca Grant No. 4.

33. The applicants are the present owners of the Baca Grant No. 4, and, as such, are the owners of all underground water, tributary or otherwise, beneath the Baca Grant No. 4. Based upon that ownership, applicants are, in their discretion, entitled to the absolute and undiminished use and disposition of any and all underground water, tributary or otherwise, which they may capture through wells located on the Baca Float No. 4. For the purpose of this application, and without prejudice to other uses or applications to use water which they may make in the future, applicants presently claim the right to use and dispose of that underground water claimed in the Baca Wells, as described in ¶ 2.A., above, and as shown in Exhibit A hereto.

WHEREFORE, pursuant to Rule 57, C.R.C.P., and The Uniform Declaratory Judgments Law, §§ 13-51-101, *et seq.*, C.R.S. 1973, applicants respectfully request the judgment, order and decree of this Court that:

A. Based upon the laws of Spain and Mexico as continued in force and effect by the Treaty of

Guadalupe Hidalgo, the Act of June 21, 1860, and the law of nations, the applicants are the fee owners of all underground water, tributary or otherwise, underlying the Baca Grant No. 4.

B. Based upon their fee ownership of all underground water beneath the Baca Grant No. 4, the applicants are entitled, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which they may capture through wells located on the Baca Grant No. 4.

C. Based upon their fee ownership, applicants are entitled to the absolute and undiminished use and disposition of such underground water, tributary or otherwise, in the manner and amount claimed in the Baca Wells, as described in ¶ 2.A., above, and as shown in Exhibit A.

D. Applicants may have such other relief as this Court deems proper in this case.

PART III:

DETERMINATION OF RIGHTS TO GROUNDWATER BASED ON GRANT BY UNITED STATES PURSUANT TO THE ACT OF JUNE 21, 1860.

34. The applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10 and 18 through 33, above.

35. The Act of June 21, 1860, authorized the heirs of Cabeza de Baca to select up to five tracts of land in replacement for the land claimed by them under the 1821 Las Vegas Grandes grant. The Baca heirs, in compliance with the Act, did so and their ownership of the Baca Grant No. 4 was finalized on March 18, 1864.

36. As described by the United States Supreme Court in *Shaw v. Kellogg*, 170 U.S. 312 (1898), the purpose and result of the Act of June 21, 1860, was to finally and unconditionally fix the title to the Baca Grant No. 4 in the heirs of Cabeza de Baca.

37. The Baca Grant No. 4, like the other four floats selected by the Baca heirs, is a legislative grant *de novo* by the Congress of the United States, the body having the authority to make conveyances or other disposals of the property of the United States, to the heirs of Cabeza de Baca of all rights of the United States in the premises encompassing Baca Grant No. 4.

38. Said legislative grant was a grant of absolute right, title, and interest by the United States to the heirs of Cabeza de Baca of the premises comprising the Baca Grant No. 4.

39. Said legislative grant divested the United States of all legal right, title and interest in the premises constituting the Baca Grant No. 4 and segregated the premises from the public domain.

40. The absolute right, title and interest so vested in the heirs of Cabeza de Baca included their unconditional and absolute fee ownership of all underground water underlying the Baca Grant No. 4.

41. The fee ownership of underground water beneath the Baca Grant No. 4 has continued through the years in the successors to the Baca heirs and continues to the present.

42. Applicants are the successors to the heirs of Cabeza de Baca and are the owners of and, based upon that ownership, entitled, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which

they may capture through wells located on the Baca Grant No. 4.

43. For the purpose of this application, and without prejudice to such other uses or applications to use water which they may make in the future, the applicants presently claim the right to use and dispose of that underground water claimed in the Baca Wells, as described in ¶ 2.3., above, and as shown in Exhibit A hereto.

WHEREFORE, pursuant to Rule 57, C.R.C.P., and The Uniform Declaratory Judgments Law, §§ 13-51-101, *et seq.*, C.R.S. 1973, the applicants respectfully request the judgment, order, and decree of this Court that:

A. By virtue of absolute grant of the United States under the Act of June 21, 1860, the applicants are the fee owners of all underground water, tributary or otherwise, underlying the Baca Grant No. 4.

B. Based upon their fee ownership of all underground water underlying the Baca Grant No. 4, applicants are entitled, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which they may capture through wells located on the Baca Grant No. 4.

C. Based upon their fee ownership of said underground water, the applicants are entitled to the absolute and undiminished use and disposition of such underground water, tributary or otherwise, in the manner and amount claimed in the Baca Wells, as described in ¶ 2.A., above, and as shown in Exhibit A.

D. The applicants may have such other relief as this Court determines proper in this case.

PART IV

DETERMINATION OF RIGHTS TO TRIBUTARY GROUNDWATER ESTABLISHED BY APPROPRIATION PURSUANT TO COLORADO LAW.

44. Applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10, above.

45. Insofar as the Court may find that the applicants are not entitled to relief as requested in Parts I, II and III, above, the applicants have nevertheless perfected an appropriation of tributary water through the wells described in paragraphs 2 and 3, from the source and depths described in paragraph 4, on the date set forth in paragraph 5, in the amounts claimed in paragraph 6, and for the proposed uses enumerated in paragraph 8, above.

46. With respect to the act of appropriation generally described in paragraph 5, above, said appropriation was made under the following more specific circumstances:

a. In October, 1985, The Baca Corporation, formerly First Delaware-Colorado Corporation, formerly First Colorado Corporation d/b/a First Delaware-Colorado Corporation (hereinafter "FCC") acquired the land, consisting of Baca Grant Ranch as well as certain lands near the town of Villa Grove, all as more fully described in Exhibit C.

b. In April, 1986, FCC's Board of Directors adopted a "Resolution of Intent to Develop, Withdraw, Use and/or Appropriate Water," involving the wells described in paragraphs 2 and 3, above. *See* Exhibit E, page E-1, *et seq.*

c. Commencing on April 21, 1986, FCC caused a detailed field survey to be made of the well locations. *See* Exhibit A.

d. As a part of said survey signs were posted at each well location giving notice of the intent to appropriate water through each of said wells. *See* Exhibit A, plate 2.

e. Newspaper notice of said intent was published first on April 30, 1986, and again in part (to correct typographical errors) on May 23, 1986. *See* Exhibit E, page F-1, *et seq.*

f. On June 6, 1986, FCC conveyed the land to its wholly-owned subsidiary, The Baca Ranch Company (hereinafter "BRC"), together with the appropriation of water described above.

g. On August 15, 1986, BRC and American Water Development, Inc. (hereinafter "AWDI") entered into a "Tributary Water Supply Contract" under which, for valuable consideration: (1) the AWDI contracted to supply water for supplemental, agricultural, industrial and geothermal purposes, and (2) as agent or attorney-in-fact for BRC, AWDI was to file the instant application. *See* Exhibit E.

47. As generally described in paragraphs 6 and 8, above, pursuant to said "Tributary Water Supply Contract," and as more fully. described in Exhibit E, the applicants are to supply BRC with the following annual amounts of water for the indicated purposes:

| Amount | Purpose |
|---|---|
| 17,000 a.f. | Supplemental |
| 115,000 a.f. | Agricultural |
| 45,000 a.f. | Industrial |
| 20,000 a.f. | Geothermal |

WHEREFORE, AWDI respectfully requests the judgment, order and decree of this Court:

A. Confirming and quantifying applicants' entitlement to such tributary groundwater without requiring a plan for augmentation, and

B. Upon submission of a satisfactory plan for augmentation, if any, necessary to eliminate any injury which may be caused by the exercise of the water rights claimed herein, awarding applicants a conditional water right to withdraw tributary groundwater through said wells pursuant to the provisions of Colorado law, Section 37-92-101, C.R.S., *et seq.*

/s/ Bruce D. Bernard
BRUCE D. BERNARD, #12166
Vice President and
General Counsel
American Water
Development, Inc.
The Baca Ranch Company
The Baca Corporation
Suite 2950
1099 18th Street
Denver, Colorado 80202
303/294-9422

STATE OF COLORADO )
) SS.
COUNTY OF DENVER )

I, Maurice F. Strong, as President of American Water Development, Inc., The Baca Ranch Company and The

Baca Corporation, state under oath that I have read this application and verify its contents.

/s/ Maurice F. Strong
Applicant

Subscribed under oath before me on December 30, 1986.

My commission expires: August 11, 1990

/s/ Judith L. Repp
Notary Public

TABLE OF EXHIBITS

| Exhibit | Title |
|---|---|
| A | "First Colorado Corporation (d/b/a First Delaware-Colorado Corporation) Development Plan for Baca Grant Ranch Water Requirements," May 7, 1986 (seven plates) |
| B | Legal Description of Lands to be Irrigated |
| C | Consolidated legal description of the "Lands" |
| D | Map of the Survey of Grant No. 4 |
| E | "Tributary Water Supply Contract," between Baca Ranch Company and American Water Development, Inc. |

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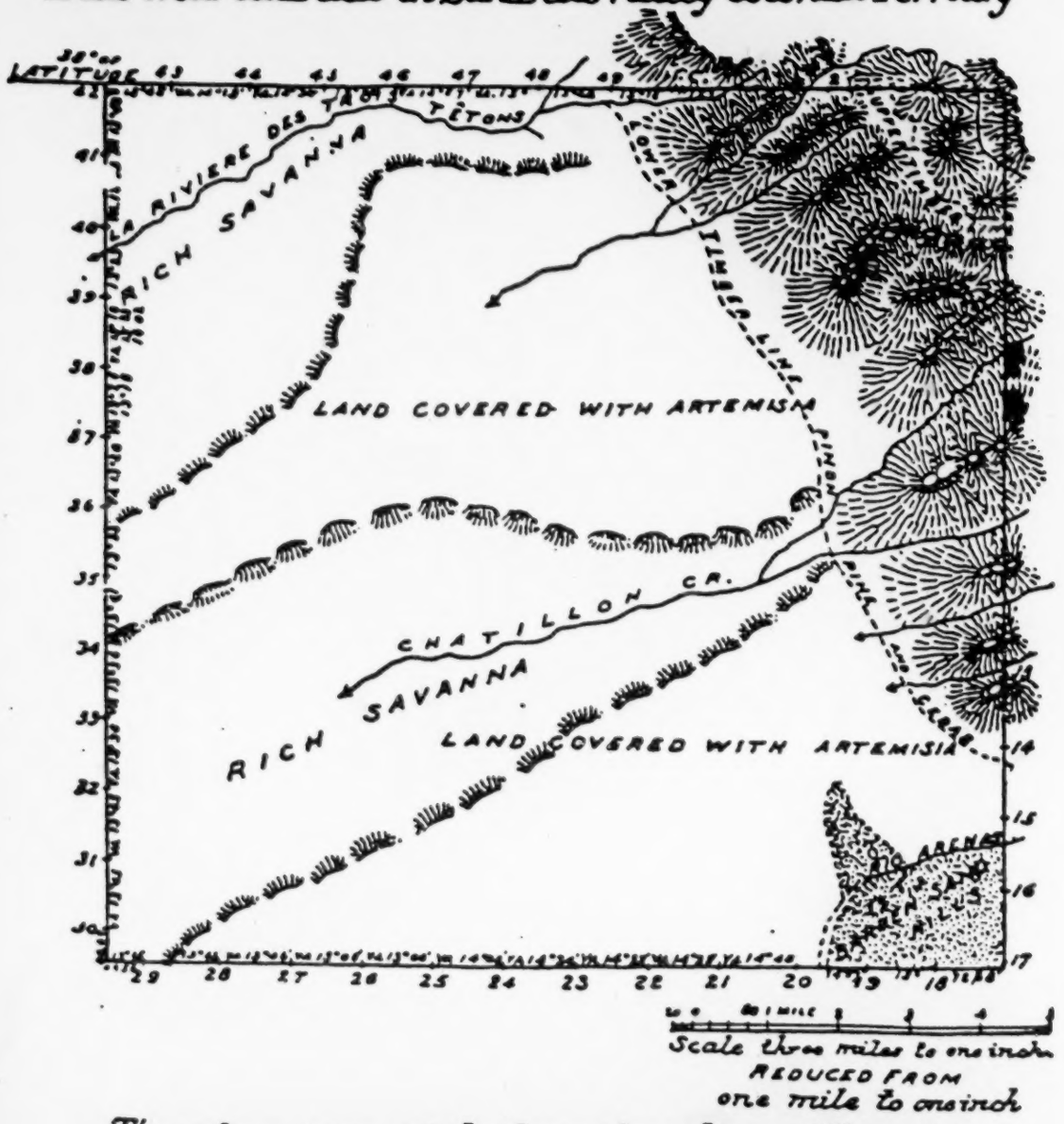
[EXHIBITS A-C, E Omitted in Printing]

EXHIBIT D

Map of the Survey of Grant No. 4

**MAP** OF THE **SURVEY** OF **GRANT** N°4 OF THE HEIRS OF
Luis Maria Baca in San Luis Valley Colorado Territory




The above map of the boundary lines of Grant No. 4 of the heirs of Luis Maria Baca in San Luis Valley Colorado Territory, as surveyed by Albinus Z. Sheldon under his contract bearing date the 7th day of October 1863 is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the act of Congress approved June 21st 1860.

Surveyor Generals Office JOHN PIERCE
Denver March 18th 1864 Sur. Genl. Colo. & Utah

HOUSE OF REPRESENTATIVES.

36TH CONGRESS, *1st Session.*

Ex. DOC. No. 14.

# NEW MEXICO – PRIVATE LAND CLAIMS.

## LETTER FROM THE SECRETARY OF THE INTERIOR, COMMUNICATING

***Documents in relation to private land claims in New Mexico.***

FEBRUARY 10, 1860. – Referred to the Committee on Private Land Claims, and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
*Washington, February* 3, 1860.

SIR: I have the honor herewith to transmit, for the action of Congress under the eighth section of the act approved July 22, 1854, the transcripts of nineteen private land claims in New Mexico, designed for the House of Representatives, as indicated in the letter of the Commissioner of the General Land Office, of the 30th November last, of which a copy is now enclosed.

Similar documents, submitted by the Commissioner in the same letter, for the Senate of the United States, have been this day transmitted to the presiding officer of that body.

Very respectfully, your obedient servant,

J. THOMPSON,
*Secretary.*

Hon. W. PENNINGTON,
*Speaker of the House of Representatives.*

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GENERAL LAND OFFICE, *November* 30, 1859.

SIR: I have the honor to transmit herewith, in duplicate, the documents in relation to nineteen private land claims, numbers 20 to 38, both inclusive, in New Mexico, with the request that they may be laid before the ensuing Congress for their final action thereon. These claims have been investigated and approved by the surveyor general of New Mexico, with the exception of number 26, which has been rejected by him.

The foregoing documents are put up in two separate packages, marked "U.S. House Reps.," and "U.S. Senate," and each of the nineteen claims is accompanied by a schedule of documents specified in the exhibit "A" herewith.

I have the honor to be, very respectfully, your obedient servant,

S. A. SMITH,
*Commissioner.*

Hon. J. THOMPSON,
*Secretary of the Interior.*

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## CLAIM NO. 20.

## TOWN OF LAS VEGAS. – THOMAS BACA *et al.*

## NOTICE.

TERRITORY OF NEW MEXICO, )
*County of Santa Fé* )

*To the Hon. William Pelham, surveyor general of the Territory of New Mexico, under the act of Congress approved July 22, A. D.* 1854:

Your petitioners, the surviving heirs-at-law of one Luis Cabeza de Baca, deceased, would respectfully state that, on the 16th day of January, 1821, the provincial deputation of the State of Durango granted to the ancestor of your petitioners, Luis Cabeza de Baca, a tract of land called the "Las Vegas Grandes," and which said grant was afterwards ratified by the provincial deputation of New Mexico, and which said grant has for its boundaries the following landmarks, to wit: On the north the Chapellote river; on the south the boundary of San Miguel del Bado; on the east the Aguage de la Llegua and the boundary of Antonio Ortiz, and on the west the summit of the Pecos mountains, all of which will more fully appear by reference to the said grant, now on file in the office of the surveyor general, No. 137, and the grant to Antonio Ortiz, No. 727, and the grant to San Miguel del Bado, No. 125, to all of which reference is hereby made. Your petitioners further state that said lands, marks, and boundaries are well known and easily discovered, but inasmuch as no survey of said lands has as yet ever been made, the quantity of land included within said boundaries is unknown to your petitioners. Your petitioners further state that it will appear by reference to

said grant that it was made to the said Luis Cabeza de Baca and his male children, and invested him and his male children with an absolute title to said lands.

Your petitioners further state that the said Luis Cabeza de Baca and his male children took possession of said lands under said grant, built a ranch upon said lands, and with their servants and stock, consisting of about six hundred mules and horses, continued to use, occupy, and possess the lands aforesaid, and after several years' peaceable and quiet occupancy of said lands they were driven away from them by the hostilities of the Indians, and the said six hundred mules and horses, of the value of thirty-six thousand dollars, were taken away by the said hostile Indians. Your petitioners further state that hostilities continued to exist upon the part of the Indians, so that said lands could not be occupied by them until about the year 1835, at which time a grant was made by the provincial deputation of New Mexico to Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and twenty-five others, extending to any others desiring to settle within the grant to the lands of your petitioners, as will more fully appear by reference to said grant, now on file in the office of the surveyor general, and No. 12 on the docket book. Your petitioners further state that at the time said grant was made by the provincial deputation of New Mexico to the said Juan de Dios Maese and others, the said deputation, and said, Juan de Dios and other grantees, well knew that said lands of right belonged to and were the lands of your petitioners under the previous grant of the State of Durango, confirmed and ratified by the provincial deputation of New Mexico, by means whereof the said grant is fraudulent and void, and the

said Juan de Dios Maese and others acquired no title to said lands under said grant, and the said lands still rightfully belong to your petitioners.

Your petitioners further state that said lands are situated in the county of San Miguel, in the Territory of New Mexico. Your petitioners further state that said Luis Cabeza de Baca has long since departed this life, and the only male children and the said Luis Cabeza de Baca, now living, are the following, to wit: Luis Baca, Prudencio Baca, Jesus Baca the 1st, Felipe Baca, Jesus Baca the 2d, Domingo Baca, and Manuel Baca. Your petitioners further state that the following sons of Luis Cabeza de Baca are dead, to wit: Juan Antonio Baca, José Baca, José Miguel Baca, Ramon Baca, and Matio Baca; and, at the time of their decease, they left the following children and heirs-at-law then surviving, to wit: Juan Antonio Baca left him surviving the following children: Jesus Maria Baca, Francisco Tomas Baca, Incarnacion Baca, José Baca, Josefa Baca, Guadalupe Baca, Altagracia Baca, Nicolas Baca, Tomas Baca, Trinidad Baca. José Baca left him surviving the following children: Antonio Baca, Felipe Baca, José Maria Baca, Francisco Baca, Fernando Baca, and Polonio Baca. José Miguel Baca left him surviving the following children, to wit: Diego Baca, Quirina Baca, Romaldo Baca, Guadalupe Baca, Paulina Baca, and Martina Baca. Ramon Baca left him surviving the following child, to wit: Ygnacio Baca. Mateo Baca left him surviving the following children, to wit: Luis Baca, Alejandro Baca, Juan de Dios Baca, and Martin Baca. Your petitioners further state that the foregoing list contains all the surviving heirs of the said Luis Cabeza de Baca, deceased, known to your petitioners, and they are all residents of the Territory of

New Mexico. Your petitioners further state that the infancy of many of said heirs, the internal revolutions of the republic of Mexico, the war with the United States, and the acquisition of this Territory by the United States, have hitherto prevented them from regaining possession of said lands thus wrongfully taken from them. Your petitioners therefore ask that their title be investigated, and that such steps be taken in the premises as will secure to them the benefits of said grant, and a legal title to the same under the said act of Congress of July 22, 1854. All of which is respectfully submitted.

JOHN S. WATTS,
*Attorney for Petitioners.*

SURVEYOR GENERAL'S OFFICE,
*Santa Fé, New Mexico, August* 31, 1859.

The above is a true copy of the original on file in this office.

WM. PELHEM,
*Surveyor General.*

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## GRANT – TRANSLATION.

SECRETARY'S OFFICE OF THE MOST EXCELLENT TERRITORIAL DEPUTATION OF NEW MEXICO

I, the undersigned, secretary of the most excellent territorial deputation of Santa Fé, New Mexico, certify that in the book in which are recorded the proceedings of said must excellent deputation, on the fortieth page of

said book, is to be found the action taken on a petition presented by Don Juan Antonio Cabeza de Baca, in the following words literally taken therefrom, viz:

MOST EXCELLENT SIR: The citizen Juan Antonio Cabeza de Baca, in the name of his father, Don Luis Maria, in the best form and most approved manner represents to your excellency that on the 16th day of January, 1821, my said father presented to the most excellent provincial deputation of Durango the petition herewith presented, and it was therefore ordered by the body that the communication addressed by the present political chief to the justice of the peace of El Bado, which is herewith presented, be concurred in.

These legal steps, together with those taken by the political chief in his communication addressed to the justice of El Bado, have caused my father to believe that the lands commonly called Las Vegas Grandes are his property, and consequently should not be granted away, at the same time calling your excellency's attention to the fact that said lands have been occupied with our stock, and my father has consequently been considered its proper owner; further, if the fact of my father not being able to produce the documents or possession, will be any cause for not recognizing said land as his, I pray your excellency to take into consideration that my father is not to be blamed in this matter, as he has never ceased to present his claim; on the contrary, it should be preferred to all others, not only on account of the length of time which he has held it, but also for having taken the steps necessary to complete his perfect title thereto. Therefore I pray your excellency to cause the proper title deed to the

issue in favor of my aforesaid father, with all the necessary requisites, being in justice due to him.

SANTA FÉ, *February* 16, 1825.

JUAN ANTONIO CABEZA DE BACA.

Don Luis Maria Cabeza de Baca, resident of the province of New Mexico, for himself and in the name of seventeen male children, appears before the supreme tribunal of the deputation of the province of New Mexico, to whom corresponds the distribution and marking out of the unclaimed public lands, and states that a certain tract of land suitable for cultivation and pasturage, called the Vegas Grandes, on the Gallinas river, in the jurisdiction of El Bado, being in the above condition, and not having sufficient room, and being very much confined, I suffer a great many injuries: therefore I pray that the aforesaid tract of land be granted to me for the purposes above mentioned, in order that I may with convenience cultivate the soil and advance the interests of agriculture, pasture the animals Providence has been pleased to favor me with, and live in the quietude and repose I aspire to.

This same petition was presented to the government of this province, and in a decree of the 18th of February last the grant was made to me in company with eight citizens of El Bado. These persons having other grants take no interest in this grant. I therefore, with my said children, renew my application under the protection of the wise and beneficent laws of the sovereign cortes. I therefore pray the supreme tribunal, to whose jurisdiction belongs the conferring of this grant, to donate it to me, with the following boundaries, which are: on the

north the Chapellote river; on the south the boundary of El Bado; on the west the summit of the Pecos mountain; on the east the Aguage de la Llegua and the boundary of Don Antonio Cortiz – a benefaction which I expect from the liberality of the aforesaid supreme tribunal.

NEW MEXICO, *January* 16, 1821.

LUIS MARIA CABEZA DE BACA.
[Rubric.]

In view of the petition presented by Don Luis Maria Cabeza de Baca to the most excellent provincial deputation of Durango on the 16th day of January, 1821 this province being subordinate to that corporation, and the report made by his excellency the governor Colonel Facundo Melgares, touching the contents of said petition, therefore they saw proper to issue an order which is literally as follows: Supposing that the partners of Don Luis Maria Cabeza de Baca have other lands where they can pasture their stock, this deputation has determined to grant unto the second the land commonly called the Vegas Grandes, provided the others have erected no buildings on said lands or incurred other expenses, unless they shall agree that the amounts disbursed be refunded to them by the aforesaid Baca, assigning to them a portion equal to that held by them in the Vegas Grandes, in the place to be designated by themselves, of which you are hereby informed, so that you may cause the same to be complied with and the parties interested be informed thereof. God preserve you many years. Durango, May 29, 1821. Signed, Diego Garcia Conde. Signed, Miguel de Zubirria. To his excellency the governor of New Mexico. And I enclose the same to you in

order that, in compliance with what has been ordered, you proceed to place the aforesaid Luis Maria Cabeza de Baca in possession, according to the terms set forth in his petition, which is herewith enclosed, the eight citizens included in his first petition having placed no improvements on the aforesaid land, placing immediately after his petition the proceedings had by you in the premises, which will be returned to these archives, from whence a certified copy will be given to the party interested. God preserve you many years. Santa Fé, October 17, 1823.

BARTOLOME BACA.

Don MANUEL ANTONIO BACA, *Justice of El Bado.*

Public session of the 16th day of February, 1825, book second of the proceedings of said body, page 40, section 3.

A petition from Don Juan Antonio Cabeza de Baca was read, referring to the grant of land made to him in one thousand eight hundred and twenty-one by the most excellent provincial deputation of Durango, to which corporation New Mexico was subject at that period. It was resolved that the proper writ be issued, giving a copy thereof to the party interested, and confirming the grant made by said corporation on the date aforesaid; which documents will be presented, as required, to the territorial justice of El Bado, who, having then there the grant made to Don Salvador Montoya, will place the aforesaid Don Luis Maria Cabeza do Baca and male children in possession of the aforesaid land according to the action had in the premises, and which has been granted to the party without injury to any third party.

ANTONIO ORTIZ, *President.*
PEDRO GARCIA.
JOSE FRANCISCO BACA.
PEDRO BAUTISTA PINO.
MARTIAS ORTIZ.

JUAN BAUTISTA VIGIL, *Secretary.*

SANTA FÉ, *February* 27, 1825.

A correct copy of the original deposition in the archives of this most excellent deputation of New Mexico, under my charge.

JUAN BAUTISTA VIGIL, *Secretary.*

Fees for the present copy, twenty hard dollars.

VIGIL.

SAN MIGUEL DE BADO, *December* 26, 1825.

Although Don Miguel Baca and Don Mateo Baca appeared before me on the 20th, in the afternoon, asking the restoration of the land granted to Don Luis Maria Cabeza de Baca and children by the most excellent deputation, and not being able to do so on account of having promulgated an order to the citizens of my jurisdiction to commence on the 21st an election for my successor and members of the corporation, and having been so much indisposed on the second day of the election that I suspended said election until the 3d, and which I terminated on the 5th, my disease having reached its crisis, and was obliged to confess, as will be proven by the messengers of Don Luis Maria Cabeza de Baca, and these have been the reasons for not having complied with the order.

THOMAS SENA, *Constitutional Justice.*

SANTA FÉ, *January* 13, 1826.

Let it proceed to the constitutional justice of El Bado, to give the possession granted.

NARBONA.

*To his excellency the Commanding General and Governor of this Territory:*

The citizen Luis Maria Cabeza de Baca with the greatest submission and respect appears before you and states: That having applied several times to justices of El Bado to place me in possession of the tract commonly called Las Vegas Grandes, granted to me by the provincial deputation of Durango in the year 1821, and confirmed by the most excellent deputation of this Territory, as will appear by the documents accompanying this my petition, and contained in five written pages, and the statement of the justice Don Thomas Sena, which will give you the information you may require in your decision, I therefore pray your excellency that, if I have any right, you will be pleased to direct the justice of the precinct of El Bado to fulfil what has been referred.

LUIS MARIA CABEZA DE BACA, *persecuted.*

SANTA FÉ, *January* 13, 1826.

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
*Santa Fé, New Mexico, July* 31, 1859.

The foregoing is a correct translation from the original Spanish on file in this office.

DAVID V. WHITING, *Translator.*

SURVEYOR GENERAL'S OFFICE,
*Santa Fé, New Mexico, September* 17, 1859.

The foregoing is a true copy from the original now on file in this office.

WM. PELHAM, *Surveyor General.*

NOTICE.

UNITED STATES OF AMERICA, )
*Territory of New Mexico.* )

*To the Hon. William Pelham, Surveyor General of the Territory of New Mexico:*

Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of New Mexico, represent to your honor that they and the citizens they represent are the claimants and legal owners of a certain tract of land lying and being situate in the county of San Miguel, in the Territory of New Mexico, which said land was granted by the provincial deputation of said Territory in the year A. D. 1835, to Juan de Dios

Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casados, in their own behalf and that of twenty-five other inhabitants of said county, which said grant is now filed with this petition, (with leave to refer thereto as often as may be necessary,) and the boundaries of said grant are as follows, to wit: Bounded on the north by the Sapello river, on the south by the boundary grant of Don Antonio Ortiz, on the east the Aguage de la Llegua, and on the west the grant of San Miguel del Bado; and the said claimants claim under and by virtue of settlements made under said original grant, and in conformity with the terms of said grant. Your petitioners refer to the laws, usages and customs of Mexico in force at the time of the making of said grant, to the Spanish laws and regulations which were declared and recognized by the government of Mexico to be in force and effect. For which power and authority, see Collection of the Decrees and Orders of the Cortes of Spain, published by Mariano Galvan in 1829, page 56, and from page 91 to 101; see also Decrees of Mexico of June 4 and September 18, 1823, pages 123 and 180, 2 vol. Collection of Decrees; see, also, Ordenanzas de Tierras y Aguas, page 8; Peters' Reports, 436; I Howard, 24; 15th Peters, 130; 6th Peters, 621; Holcomb's U.S. Digest, pages 358 to 363.

The said claimants cannot show the quantity of land embraced in said grant, except as the same are set forth in the boundaries of said grant, nor can they furnish a plat of survey of said grant, as no survey of the land has ever been executed.

Your petitioners, the claimants, are also informed and believe that Thomas Cabeza de Baca, for himself and

others, are claimants, also, for the lands embraced in said grant and now claimed by your petitioners. Your petitioners pray that their claim and title to said lands be examined as required by law, and that said grant be confirmed to them; and, as in duty bound, will ever pray, &c.

SMITH, HOUGHTON &
ASHURST,
*For Petitioners.*

SURVEYOR GENERAL'S OFFICE,
*Santa Fé, New Mexico, August* 20, 1859.

The above is a true copy of the original on file in this office.

WM. PELHAM,
*Surveyor General.*

GRANT – TRANSLATION.

Seal Third. [SEAL.] Two Rials.

For the years one thousand eight hundred and twenty-six and eight hundred and twenty-seven.

MOST RESPECTFUL CORPORATION: The citizens Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casaos, for themselves and in the name of twenty-five men, appear before your honorable body in the best and most approved manner, and according to law, and state that having registered a vacant and uncultivated piece of land, commonly known by the name of Las Vegas, on the Gallinas river, about five leagues distant

from this settlement, which land we solicit for the purpose of planting a moderate crop, to have also the necessary land for pasture and watering places, and having the following boundaries: on the north the Sapello river, on the south the boundary of the grant made to Don Antonio Ortiz, on the east the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado, which grant we pray for without injury to any third party, binding ourselves to receive possession in the name of the federation, and to comply with the reasonable and equitable conditions which your excellency, by virtue of the authority conferred upon you, may be pleased to establish for the grant of the land, being pleased to lay this our petition before the most excellent territorial deputation, having first obtained the customary report which by law is intrusted to your excellency, in order that that most excellent body may order the aforesaid grant to be made to us, in which the advancement of agriculture and the well being of several families without occupation are interested. Therefore, we request and pray your excellency that considering us as having presented ourselves, to yield to our petition, which we swear not to be done in malice; and in whatever may be necessary, &c.

JUAN DE DIOS MAESE. (Rubric.)
MANUEL DURAN. (Rubric.)
MIGUEL ARCHULETA. (Rubric.)
JOSÉ ANTONIO CASAOS. (Rubric.)

SAN MIGUEL DEL BADO, *March* 20, 1835.

SANTA FÉ, *March* 24, 1835.

On this date the justice of El Bado is notified to proceed according to the directions of the most excellent deputation and this government.

SARRACINO. (Rubric.)

SAN MIGUEL DEL BADO,
*In the Town House, on the 20th day of March,* 1835.

The foregoing petition, signed by the subscribers thereto, is received. This corporation, desirous of encouraging the advancement of agriculture, and the location of so many families without occupation, and being true that the land solicited as above is public land, and without injury to any third party nor of (torn) * * * let this petition proceed to the most excellent territorial deputation, in order that its excellency, if it sees proper, may provide them with the land prayed for, the entailment of which is earnestly aspired to.

JOSÉ ULIBARRI, *President.* (Rubric.)
FRANCISCO SENA,
*First Justice.* (Rubric.)
LEONIOS LUCERO,
*Fourth Justice.* (Rubric.)
GERONIMO GONZALES,
*Second Justice.* (Rubric.)
THOMAS ARAGON,
*Attorney.* (Rubric.)
JOSÉ CANDELARIA FLORES,
*Third Justice.* (Rubric.)

Before me,

JOSÉ ANTONIO CASAOS,
*Secretary of Corporation.* (Rubric.)

(Book 1st, page 6.)

OFFICE OF THE MOST EXCELLENT DEPUTATION OF NEW MEXICO,
*Santa Fé, March* 23, 1835.

In consultation of to-day, its excellency has resolved as follows:

The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate, provided "that the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which, the political chief will receive the petition which may be made, and shall cause them to be provided for agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. ABREU, *Secretary.* (Rubric.)

In reference to a petition made by the President's (torn) * * * Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, for themselves and in the name of twenty-five other individuals, dated the 20th inst., in which they solicited land in Las Vegas, its excellency the provincial deputation has resolved the following in reference to the matter:

(Book 1st, page 6.)

OFFICE OF THE SECRETARY OF THE MOST EXCELLENT
DEPUTATION OF NEW MEXICO,
*Santa Fé, March* 23, 1835.

In consultation of to-day its excellency has resolved as follows:

The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate, provided "that the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which, the political chief will receive the petitions which may be made, and shall cause them to be provided for, agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. ABREU, *Secretary.* (Rubric.)

And I communicate it to you for the entire compliance therewith, taking into consideration that the grants are to be made according to the means of each one of the petitioners, in order that they may not leave any land which may be given to them without cultivation. It is also convenient to suggest that you should select a site for a town to be built by the inhabitants, together with such other steps as you may deem proper for the security of the inhabitants, who, on account of settling on the land indicated, will be included in your jurisdiction; you will therefore adopt such measures as will be most conformable to the laws.

You will retain the petition relative to the matter, and return (torn) as this should be (torn) of the proceedings

had by you; of all which you will inform this government so soon as it is in condition to do so.

God and Liberty.

F. SARRACHINO. (Rubric.)

SANTA FÉ, *March* 24, 1835.

*To the Constitutional Justice of El Bado:*

At this time there is no paper with the third seal in this office.

SARRACINO.

At Nuestra Señora de Ios Dolores de Las Vegas, on the sixth day of the month of April, in the year one thousand eight hundred and thirty-five, jurisdiction of San Miguel del Bado, I, the citizen José de Jesus Ulibarri y Duran, constitutional justice, the only one in this jurisdiction, proceeded to this town for the purpose of distributing the lands to twenty-five individuals, mentioned in the petition dated March 28, 1835, and in general to those who are without lands, not only those within this jurisdiction, but also any one who may present himself to me who has no occupation; and having examined the land, I took the measures from north to south, after which I made the distribution according to that portion of the colonization law which refers to grants of the public lands, complying with the greatest care with the directions of the most excellent territorial deputation of New Mexico, contained in its decree of the 23d of March, 1835, and the decree of his excellency the political chief, citizen Francisco Sarracino, dated the 24th of the same month; each individual received a gratuitous piece of land according to his means, with the understanding that of

the lands given to the persons contained in the accompanying list none should remain uncultivated. The whole matter was concluded with the best measures which myself and the parties interested considered the most convenient, in order that each party should be satisfied with his share, setting opposite to each one's name the number of varas he received. The aforementioned list also contains the number of individuals who resided in the new settlement, and, after having made the distribution, I proceeded to make known to them the petition found at the commencement of this document, assigning them the same boundaries as are set forth in the petition. I also informed them that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to. Also, that each one be well provided with arms, the care of which is intrusted to the lieutenant of police of that ward, who shall inspect the arms every eight days, and, should he observe any infraction, to inform this court, as the head of the ward, thereof, so as to provide the necessary measures. They were also informed that no one should sell his lands until he acquired the title prescribed by law to all colonists, and, in order that it may so appear at the present time and in the future, placed the originals in the archives under my charge, signing the same with three attending witnesses, in the absence of (torn), there being none in the terms (torn) law, to which I certify.

JOSÉ JESUS ULIBARRI. (Rubric.)

Attending,

José Miguel Sanchez (Rubric.)

Attending,

Antonio Nieto. (Rubric.)

Attending,

Manuel Duran. (Rubric.)

Decree. – The originals annexed to these proceedings, containing eight written pages, are deposited in the archives under my charge. I have so provided, ordered, and signed on said day, month, and year, and I sign with those in my attendance, to which I certify.

JOSE DE JESUS ULIBARRI, (Rubric.)

Attending,

Manuel Duran. (Rubric.)

Attending,

Antonio Nieto. (Rubric.

List showing the number of individuals who occupy the new settlement entitled "Nuestra Señora de los Dolores de Las Vegas," and showing the number of yards of land each one has received; which is as follows, to wit:

Citizen Acensio Baca ..... 175
Citizen Simon Blea ..... 100
Citizen José de Jesus Ulibarri ..... 150
Citizen Santiago Ortega, selected in Balendre, 150 yards of land, ..... 150
Citizen Juan de Dios Maese ..... 250
Citizen Juan José Baca ..... 200
Citizen Francisco Lopez ..... 100
Citizen Tomas Baca ..... 225

For gardens, 125 varas towards the north, and 25 for a road to the watering place, one each side, and towards

the south 750 varas for gardens, from whence the distribution continues, to the individuals contained in the list, noting that the number of yards herein stipulated for gardens and roads is opposite to the square plaza which I marked out on either side. I left this number of yards for the inhabitants of the place, to be divided equally between them:

Citizen José Gaudalupe Baca ..... 150
Citizen Miguel Rendon ..... 150
Citizen Rafael Rendon ..... 100
Citizen Cruz Rendon ..... 150
Citizen José Lucero ..... 200
Citizen Foribio Crespin ..... 100
Citizen Pablo Ulibarri ..... 150
Citizen Antonio Ulibarri ..... 185
Citizen Juan Pedro Archuleta ..... 150
Citizen Eulogia Segma ..... 100
Citizen Ramon Ulibarri ..... 100
Citizen Teodocio Quintana ..... 200
Citizen Felipe Tafallo ..... 250
Citizen José de Jesus Duran ..... 100
Citizen Manuel Duran ..... 175
Citizen Antonio Romo ..... 200
Citizen Simon Romo ..... 100
Citizen José Maria Martin ..... 200
Citizen Miguel Martin ..... 200
Citizen Antonio Martin ..... 200
Citizen Juan Nepomuceno Martin ..... 100
Citizen Miguel Martin, jr. ..... 100
Citizen Juan José Martin ..... 100

NOTE. – That from José de Jesus Duran to the end of the above list the land is situated in a valley on the opposite side of the river, towards the east, also the number of varas set apart for gardens and road to watering place, lie between José Maria Martin and Miguel

Martin, sr., on the side above mentioned; and, in order that it may so appear, I have signed this 6th day of April, 1835, attaching to this list of distribution the names of such individuals as may apply for lands after this date.

JOSÉ ULIBARRI.

Citizen Victorine Baca ..... 150
Citizen Hilario Gonzalez ..... 455
Citizen Antonio Gallego ..... 200
Citizen José Antonio Ulibarri, sr., (José Miguel Garcia took the place of Jose Antonio Ulibarri, sr., and entered upon his lands) ..... 125
Citizen Rufino Gonzalez ..... 100
Citizen Ambrocio Gonzalez ..... 100
Citizen Santos Gonzalez ..... 100
Citizen Francisco Sanchez ..... 355
Citizen Rafael Rodriguez ..... 166
Citizen Julian Ulibarri ..... 225
Citizen Manuel Tafolla received a portion in the valley.
Citizen Mariano Gonzalez received a portion in another valley.
Citizen Mariano Gonzalez, sr. ..... 150
Citizen Manuel Garcia ..... 250
Citizen Desiderio Maese ..... 100
Citizen Rafael Duran ..... 200
Citizen Vicente Romero ..... 200
Citizen Santiago Ulibarri ..... 600
Citizen José Leon Romero ..... 200
Citizen José Antonio Flores ..... 200
Citizen Rafael Duran ..... 200
Citizen Rafael Romero ..... 200
Citizen Miguel Romero ..... 200
Citizen Juan Christobal Armijo ..... 220

Citizen José Miguel Sanchez ..... 200
Citizen Francisco Maese ..... 111
Citizen Francisco Lucero ..... 113
Citizen Miguel Caerio ..... 150
Citizen Rafael Cestillo ..... 100
Citizen José Fernando Gallego ..... 100
Citizen José Dolores Sena ..... 185
Citizen José Ramon Sena ..... 125
Citizen Francisco Sena ..... 200
Citizen Vicente Villanueva ..... 100
Citizen José Pablo Baca ..... 100
Citizen Ramon Baca ..... 100
Citizen Feribio Archuleta ..... 100
Citizen Fernando Chaves, (Ramon Pena took his land, the other having left) ..... 100
Citizen Foribio Martin ..... 100
Citizen Miguel Montañio ..... 100
Citizen Jesus Pando ..... 100
Citizen Juan Felipe Sanchez ..... 100
Citizen Maria Encarnacion Armijo ..... 100
Citizen José Flores ..... 75
Citizen Cruz Martin, on the opposite side of the river and two little valleys ..... 100
Citizen Polonio Herrera ..... 100
Citizen Ferrer Herrera ..... 50
Citizen Fabìan Archuleta ..... 100
Citizen Simon Romo ..... 100
Citizen Ramon Vigil ..... 100
Citizen The remainder was given to Juan José Vigil 170
Citizen Anastacio Roibal ..... 175
Citizen Francisco Sanchez, also a little valley ..... 150
Citizen Pedro Barela ..... 100

Citizen Julian Jimenez ..... 100
Citizen Ramon Benavides ..... 100
Citizen Antonio Garcia ..... 100
Citizen Rafael Rodriguez ..... 100
Citizen Pedro Gonzalez ..... 200
Citizen Andres Truqueque ..... 100
Citizen Gabriel Crispin ..... 100
Citizen Ascensio Baca ..... 100
Citizen Miguel Archuleta ..... 1,067
Citizen José Maria Tafoya ..... 700
Citizen José Miguel Carrello ..... 100
Citizen Christobal Baca ..... 500
Citizen Miguel Martin ..... 125
Citizen Martin Romero, 50 more ..... 100
Citizen Domingo Gama, 50 more ..... 100
Citizen Santiago Sandoval ..... 50

Names of those in the cañada of Pecos from the road dividing lodemora to the arroyo of Pecos:

Citizen Jesus Maria Montoya ..... varas 200
Citizen Santigao Montoya ..... 100
Citizen Antonio José Suiz ..... 100
Citizen Asensio Sanez ..... 100
Citizen Tomas Ulibarri ..... 100
Citizen Rafael Rodriguez, (Antonio Saenz takes the place of Rodriguez by purchase) ..... 100
Citizen Domingo Peña ..... 200
Citizen Nerio Montoya, (Anastacia Gonzalez takes his place) ..... 150
Citizen Luis Maria Gonzalez ..... 170
Citizen Patricio Benavides, (Guillermo and Valeriano take his place, with 75 varas each in the valley above the ravine on the river) ..... 150
Citizen Christobal Baca ..... 250
Citizen Pablo Pando ..... 100

Citizen Jesus Pando ..... 100
Citizen Pedro Garcia ..... 100
Citizen Acensio Garcia ..... 100
Citizen Esquipula Baca ..... 100
Citizen Julian Archuleta ..... 100
Citizen Sebastian Duran ..... 200
Citizen Salvador Martin ..... 200
Citizen Rafael Niaso ..... 200
Citizen Andres Fruqueque ..... 100

H. Ex. Doc. 14 – 3

Citizen Francisco Lucero ..... 340
Citizen José Flores ..... 100
Citizen Francisco Sanchez ..... 400

Leaving 50 varas for a public road on the bank below where the plaza is situated, where 50 varas are to be left. Pedro Barela, two little valleys at the springs.

Names of citizens placed in possession of lands at the Puerticito, which is attached to the general list of distribution; that is, the the lower Puerticito:

Citizen Ramon Cisneros, no varas designated.
Citizen José Pablo Maese, no varas designated.
Citizen Juan Sais ..... varas 350
Citizen Antonio Sais ..... varas 250
Citizen Felipe Tafoya ..... 125
Citizen José Dolores Duran ..... 100
Citizen José Duran ..... 126
Citizen Rafael Cistillo ..... 100
Citizen Rafael Garcia ..... 125
Citizen Francisco Antonio Sanchez, (Upper Puerticito) ..... 150
Citizen Juan Martin, for himself and father, from the boundary of Mariano Gonzales to the road.
Citizen Mariano Gonzales, jr. ..... 100
Citizen Don Lorenzo Baca ..... 100

Citizen Ana Maria Chama ..... 100
Citizen Augustin Quintana ..... 100
(And a small valley in the river, not measured.)
Citizen Juan José Martin, from the boundary of Augustin to the road.
Citizen Juan Gallego, at the mouth of the cañon of the Aqua Sarca, on one side of the arroyo, from a rock in the middle of the valley to the lower rock.
Citizen Sebastian Duran ..... 100
Citizen Jesus Duran ..... 100

One hundred varas of land were given to Gregoria Vigil of the remaining lands of the Aqua Sarca, designating as boundaries, on the west the little cañon of the Aqua Sarca; on the east the arroyo Abayo; on the north a hill near the creston, and on the south the common boundary, respecting the tracts already donated.

At the request of several citizens asking for lands, composing the drippings of the plaza, for gardens, I have given to each one twenty-five varas in length, with the precise condition that they should fence them in; and in case of not doing so, they cannot claim damages. The individuals are as follows:

Francisco Sanchez ..... 25
Antonio Saenz ..... 25
Simona Gallegos ..... 25

In this respect the quantity of land which I have distributed, and which is watered by the ditch (Acequia) which was constructed across the square for the purpose of finishing the temple, is the remainder of the plain from the little hills, amounting to twenty varas, before descending to the meadow, which is divided by certain

mounds of stone on the northern side before descending to the plain where the public road is to run.

VEGAS, *June* 11, 1841.

*Distribu'ion.*

| | |
|---|---|
| Felipe Tafoya | 150 |
| Francisco Antonio Sanchez | 100 |
| Miguel Tafoya | 100 |
| Prudencio Griego | 150 |
| José Zamora | 100 |

Land distributed on the new ditch (acequia) which was opened for the construction of the upper town:

| | |
|---|---|
| Juan Manuel Martin | varas 150 |
| José Manuel Angel | 100 |
| Pedro Bastos | 200 |
| Jesus Castillo | 100 |
| José Flores | 100 |
| Manuel Archuleta | 100 |
| Crisantos Salas | 100 |
| Felipe Martin | 100 |
| Antonio José Sais | 50 |

At the springs, the foreigners William and Anthony Donaldson; José Manuel Angel, a little corner in the cerrito, not measured; Don Ramon Vigil, a valley on the other side of the arroyo of the Pecos, from the wagon road to the blue hills, not measured.

In the two of Las Vegas, on the 25th day of November, 1846, at the request and by the official grant of land for cultivation made by the senior justice to the citizens contained in the present list, I proceeded with my attending witnesses to distribute said lands, and taking the

measurement on the northern side, the individuals soliciting the same were located in the following manner:

| | Varas. |
|---|---|
| Miguel Antonio Fadrique | 200 |
| Gertrudis Salazar | 200 |
| Juan Jarmillo | 200 |
| Martin Romero | 200 |
| José Maria Garcia | 200 |
| Vicente Segma | 200 |
| Juan José Montoya | 200 |
| Jesus Maria Maese | 200 |
| Rafael Duran | 200 |
| Miguel Martin, jr. | 200 |

Anisteo Quintana, from the boundary of Miguel Martin to the road, without measurement.

The persons whose names appear on the foregoing list received the number of varas set opposite their names, it being understood that the water shall run on the bed of the river in case of a scarcity, (not legible) by appointment, and to which shall be attached the original communication granting the land; the present document to be attached to the general grant made to Las Vegas, in order that it may so appear, and for security in all time to come. To which I certify.

JUAN DE DIOS MAESE. [Rubric.]

Attending,

ANTONIO SAENZ. [Rubric.]

Attending,

FRANCISCO BUSTAMENTE. [Rubric.]

OFFICE OF THE SEÑOR JUSTICE OF THE DISTRICT OF THE CENTRE.

Informed of the contents of your note of to-day, touching petitions for lands made by certain individuals of that place. In reply, I have to state that you are authorized to place them in possession of said land on the conditions referred to yesterday.

In reference to what you requested me to investigate, touching the evidence given by the police officer, I reply that it is true; therefore you are requested to remove him from office, and appoint Francisco Martin, relieving him and exonerating him from all duty.

God and liberty.

TRINIDAD BARCELO.

VALLEYS OF SAN AUGUSTIN, *November* 20, 1846.

*To the Justice of the Peace, Don Juan de Dios Maese:*

Las Vegas, on the 17th day, (torn,) at the request of seven individuals who have registered a tract of public land, although the aforesaid land was given over three years since to another individual, who has not placed his hand on it; and seeing the neglect and little interest taken by the former possessor of the land, I, the citizen Hilario Gonzalez, accompanied by the petitioners, having examined the land, and considered their petition just, both being laborers and industrious in matters of agriculture, I saw proper to place them in possession of the number of varas of land which each one can cultivate; with the further provision, besides those provided in the colonization laws, that within eighteen months they shall use every effort to prevent their land from lying idle, and

thereby lose their title thereto, and be given to others who will cultivate them.

The following are the individuals to whom lands were distributed, which list shall be attached to the general grant:

Juan Pedro Archuleta ..... 50 varas.
Jesus Gallego ..... 50 "
José Candalaria Garcia ..... 50 "
Rafael Rodriguez ..... 50 "
José Martin ..... 50 "
Eujogio Gonzalez ..... 50 "

HILARIO GONZALEZ. [Rubric.]

Attending,
ANTONIO SAENS. [Rubric.]
Attending,
RAMON GARCIA. [Rubric.]

SURVEYOR GENERAL'S OFFICE,
*Translator's Department, Santa Fé, N. M., July* 10, 1857.

The above is a correct translation of the original on file in this office.

DAVID V. WHITING,
*Translator.*

*SURVEYOR GENERAL'S OFFICE,*
*Santa Fé, New Mexico, August* 20, 1859.

The above is a true copy of the original on file in this office.

WM. PELHAM,
*Surveyor General.*

*REPORT.*

*The heirs of Luis Maria Baca and the town of Las Vegas.*

The first of the above-mentioned cases was filed in this office on the 19th of June, 1855, and the second on the 11th of September of the same year.

These cases were set for trial at different periods, but owing to the absence of counsel and witnesses were not brought to a final close until the 10th of December, 1858.

The claim of the heirs of Luis Maria Baca is based on the following facts, as set forth in the original papers filed in the office by the claimants:

On the 16th of January, 1821, Luis Maria Cabeza de Baca, in his own name and that of seventeen male children, petitioned the provincial deputation of the State of Durango, under whose jurisdiction he avers the province of New Mexico then was, for a tract of public land suitable for cultivation and pasture, called the Vegas Grandes, on the Gallinas river, in the jurisdiction of El Bado. In this petition he states that a like petition had been made to the authorities of the province of New Mexico, and that by a decree of the 18th of February, 1820, the land was granted to him and eight other persons; but as these persons already possessed land elsewhere, they took no interest in its cultivation, and prays that the grant be made to himself and his aforementioned children, with the following boundaries, to wit: On the north the Chapellote river, on the south the boundary of El Bado, on the west the summit of the Pecos mountain, and on the east the Aguage de la Llegua and the boundary of Don Antonio Ortiz. On the 29th of May, Diego Garcia Conde and

Miguel de Zubiria, president and secretary of the provincial deputation of Durango, informed Facando Melgares, the governor of New Mexico, that on the supposition that the companions of Don Luis Maria Cabeza de Baca had other lands whereon to pasture their cattle, that deputation had determined to confer upon the said Baca the land commonly called Vegas Grandes, provided the other parties had erected no buildings on the land or made any other improvements, unless it was voluntarily agreed between the parties that Baca should reimburse them for any improvements they might have made, and that an equal quantity of land should be assigned to them wherever they would select it, in place of those donated to Baca; and the governor of New Mexico was requested to inform the parties of what had been done.

On the 17th day of October, 1823, Bartolomé Baca, political chief of New Mexico, directed the alcalde of El Bado to place Luis Maria Cabeza de Baca in possession of the land called for in his petition, as the eight individuals who accompanied him in his first petition had placed no improvements on the land; and the alcalde was required to certify at the foot of the order the proceedings had by him in the premises.

On the 27th day of February, 1825, Juan Bautista Vigil, the secretary of the most excellent deputation of New Mexico, certified that at the session of the 16th of the same month a petition of Don Juan Antonio Cabeza de Baca, son of Luis Maria C. de Baca, and one of the grantees, was read, in which he refers to the grant made in the year 1821 by the provincial deputation of Durango, *to which corporation New Mexico at that time belonged*, and it was resolved that a record of the proceedings in the case

be made and a true copy thereof given to the petitioner, and ratifying the grant made by the corporation of Durango on the date aforementioned. The petitioner was required to present himself before the territorial justice of El Bado with the copy above referred to, who, having then there the grant made to Salvador Montoya, was required to place the aforesaid Luis Maria Baca and male children in possession of the aforesaid land, in accordance with the proceedings had in the premises and without injury to any third party.

On the 26th of December, 1825, Tomas Sena, the constitutional justice of El Bado, assigned as a reason for not placing the parties in possession of the land, as he had been ordered to do, that a proclamation had been issued for the election of his successor, at which he was compelled to attend, and that on the second day after the election had commenced he was taken violently ill, and was compelled to postpone the election, as was well known to the messengers of Don Luis Maria Cabeza de Baca.

On the 13th of January, 1826, Governor Narbona again ordered the constitutional justice to place the parties in possession of the land granted.

The testimony of Manuel Antonio Baca shows that the parties were placed in possession of the land, although there is no documentary evidence of the fact.

The claim of Las Vegas is based on the following proceedings:

On the 20th day of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio

Casaos, for themselves and in the name of twenty-five others, petitioned the corporation of El Bado for a tract of land for cultivation and pasture situated in the county of El Bado and bounded as follows: on the north by the Sapello river, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Llegus, and on the west by the boundary of the town of El Bado.

On the same day the corporation of El Bado transmitted the petition to the territorial deputation, with the recommendation that the petition be granted.

On the 23d of March of the same year the grant was made by the territorial deputation with the boundaries asked for, with the further provision that persons who owned no lands were to be allowed the same privilege of settling upon the grant as those who petitioned for it.

On the 24th of the same month and year Francisco Sarracino, the acting governor or political chief, directed the constitutional justice of El Bado to place the parties in possession, which was done on the 6th day of April of the same year.

It is not supposed that Congress intended, upon the establishment of the office of the surveyor general of New Mexico, that he should be required to determine questions of right between parties, but simply to ascertain whether the claims presented to him were of such a nature as to separate the land embraced within the boundaries set forth in them from the public domain, and that conflicting claims between parties should be adjudicated before the proper tribunals of the country having jurisdiction in the premises.

Under this view of the case it will not be necessary to refer to any other points made by counsel than those touching the sufficiency of the titles given and under which the respective parties claim.

It is contended by the last grantees that the concession made to Baca by the provincial deputation of Durango was void for want of power in the tribunal that assumed to make it.

At the time the grant was made to Baca the country was in a state of confusion, arising from the severance of Mexico from the parent country. Many of the States had not yet given their adhesion to the new order of things, and in some places, as remote in the interior as New Mexico, were not even aware that a new order of things had been established; therefore the several authorities of the country exercised the power intrusted to them by the king of Spain or his lawful authorities, and as it is not disavowed that the State of Durango held jurisdiction over the province of New Mexico, it is supposed, even in the absence of any positive proof, that the deputation of that State acted within the scope of its authority when it made the grant to Baca; but in the confirmation of the grant by the territorial deputation of New Mexico in 1825, it is conceded that the province of New Mexico was under the jurisdiction of that State, and that any grant made by its legally constituted authorities was a good and valid one. In the case under consideration, no condition was attached; the grant was an absolute one. It has been held by our courts that where no conditions were attached they could not be raised by implication. So satisfied was Governor Melgares that the deputation of Durango had a right to make the concession, that he

ordered the grantees to be placed in immediate possession, which he would not have done had he doubted in the least that the authorities of that State had exceeded their powers in granting lands in the province over which he presided as governor.

But supposing the grant made to Baca by the deputation of Durango to have been null and void, its confirmation by the territorial deputation of New Mexico in 1825, at which period, it is not denied, it had the power to grant lands, would be equivalent to a new grant; and, as it is complete in itself so far as the severance of the land granted is concerned, to separate it from the public domain, it is a matter of very little importance whether the former grant by the deputation of Durango was valid or not. This grant is therefor deemed to be a good and valid one.

The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but, as far as the documentary evidence shows, is made in strict conformity with the laws and usages of the country at the time.

Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant, and that they went upon the land knowing the existence of a prior grant; but as these matters are not deemed to be pertinent to the case so far as this office is concerned, it is not necessary to comment upon them.

It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general

government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

WM. PELHAM, *Surveyor General.*

SURVEYOR GENERAL'S OFFICE,

*Santa Fé. New Mexico December* 18, 1858..

## TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT WITH THE REPUBLIC OF MEXICO.

In the name of Almighty God:

The United States of America and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony, and mutual confidence wherein the two people should live, as good neighbors, have for that purpose appointed their respective plenipotentiaries – that is to say, the President of the United States, has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said republic, who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of peace, arranged, agreed upon, and signed the following

*Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the Mexican Republic.*

### ARTICLE I.

There shall be firm and universal peace between the United States of America and the Mexican republic, and between their respective countries, territories, cities, towns, and people without exception of places or persons.

ARTICLE II.

Immediately upon the signature of this treaty, a convention shall be entered into between a commissioner or commissioners appointed by the General-in-chief of the forces of the United States, and such as may be appointed by the Mexican government, to the end that a provisional suspension of hostilities shall take place, and that, in the places occupied by the said forces, constitutional order may be reestablished, as regards the political, administrative, and judicial branches, so far as this shall be permitted by the circumstances of military occupation.

ARTICLE III.

Immediately upon the ratification of the present treaty by the government of the United States, orders shall be transmitted to the commanders of their land and naval forces, requiring the latter (provided this treaty shall then have been ratified by the government of the Mexican republic, and the ratifications exchanged) immediately to desist from blockading any Mexican ports; and requiring the former (under the same condition) to commence at the earliest moment practicable, withdrawing all troops of the United States then in the interior of the Mexican republic, to points that shall be selected by common agreement, as a distance from the seaports not exceeding thirty leagues; and such evacuation of the interior of the republic shall be completed with the least possible delay; the Mexican government hereby binding itself to afford every facility in its power for rendering the same convenient to the troops, on their march and in

their new positions, and for promoting a good understanding between them and the inhabitants. In like manner orders shall be despatched to the persons in charge of the custom-houses at all ports occupied by the forces of the United States, requiring them (under the same condition) immediately to deliver possession of the same to the persons authorized by the Mexican government to receive it, together with all bonds and evidences of debt for duties on importations and on exportations, not yet fallen due. Moreover, a faithful and exact account shall be made out, showing the entire amount of all duties on imports and on exports, collected at such custom-houses, or elsewhere in Mexico, by authority of the United States, from and after the day of the ratification of this treaty by the government of the Mexican republic; and also an account of the cost of collection; and such entire amount, deducting only the cost of collection, shall be delivered to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications.

The evacuation of the capital of the Mexican republic by the troops of the United States, in virtue of the above stipulation, shall be completed in one month after the orders there stipulated for shall have been received by the commander of said troops, or sooner if possible.

ARTICLE IV.

Immediately after the exchange of ratifications of the present treaty, all castles, forts, territories, places, and possessions, which have been taken or occupied by the forces of the United States during the present war, within

the limits of the Mexican republic, as about to be established by the following article, shall be definitively restored to the said republic, together with all the artillery, arms, apparatus of war, munitions, and other public property, which were in the said castles and forts when captured, and which shall remain there at the time when this treaty shall be duly ratified by the government of the Mexican republic. To this end, immediately upon the signature of this treaty, orders shall be despatched to the American officers commanding such castles and forts, securing against the removal or destruction of any such artillery, arms, apparatus of war, munitions, or other public property. The city of Mexico, within the inner line of intrenchments surrounding the said city, is comprehended in the above stipulations, as regards the restoration of artillery, apparatus of war, &c.

The final evacuation of the territory of the Mexican republic, by the forces of the United States, shall be completed in three months from the said exchange of ratifications, or sooner if possible: the Mexican government hereby engaging, as in the foregoing article to use all means in its power for facilitating such evacuation, and rendering it convenient to the troops, and for promoting a good understanding between them and the inhabitants.

If, however, the ratification of this treaty by both parties should not take place in time to allow the embarcation of the troops of the United States to be completed before the commencement of the sickly season, at the Mexican ports of the Gulf of Mexico, in such case a friendly arrangement shall be entered into between the

General-in-chief of the said troops and the Mexican government, whereby healthy and otherwise suitable places, at a distance from the ports not exceeding thirty leagues, shall be designated for the residence of such troops as may not yet have embarked, until the return of the healthy season. And the space of time here referred to as comprehending the sickly season, shall be understood to extend from the first day of May to the first day of November.

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the exchange of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following article, the government of the said United States will exact the release of such captives, and cause them to be restored to their country.

ARTICLE V.

The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo Del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination;

thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled *"Map of the United Mexican States, as organized and defined by various acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York, in 1847, by J. Disturnell."* Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon

the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the general government of each in conformity with its own constitution.

ARTICLE VI.

The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the River Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line defined in the preceding article; it being understood that this passage is to be by navigating the Gulf of California and the River Colorado, and not by land, without the express consent of the Mexican government.

If, by the examinations which may be made, it should be ascertained to be practicable and advantageous to construct a road, canal, or railway, which should in whole or in part run upon the River Gila, or upon its right or its left bank, within the space of one marine league from either margin of the river, the governments of both republics will form an agreement regarding its construction, in order that it may serve equally for the use and advantage of both countries.

ARTICLE VII.

The River Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits.

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said

property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

[Stricken out.]

ARTICLE XI.

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this

may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted – all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the later engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the mean time, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will

proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

ARTICLE XII.

In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican republic the sum of fifteen millions of dollars.

Immediately after this treaty shall have been duly ratified by the government of the Mexican republic, the sum of three millions of dollars shall be paid to the said government by that of the United States, at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve millions of dollars shall be paid at the same place, and in the same coin, in annual instalments of

three millions of dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions from the day of the ratification of the present treaty by the Mexican government., and the first of the installments shall be paid at the expiration of one year from the same day. Together with each annual installment, as it falls due, the whole interest accruing on such installment from the beginning shall also be paid.

ARTICLE XIII.

The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican republic, under the conventions between the two republics severally concluded on the eleventh day of April, eighteen hundred and thirty-nine, and on the thirtieth day of January, eighteen hundred and forty-three; so that the Mexican republic shall be absolutely exempt, for the future, from all expense whatever on the account of the said claims.

ARTICLE XIV.

The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in

the following article, and whatever shall be the total amount of those allowed.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and one quarter millions of dollars. To ascertain the validity and amount of those claims, a board of commissioners shall be established by the government of the United States, whose awards shall be final and conclusive: provided, that in deciding upon the validity of each claim, the board shall be guided and governed by the principles and rules of decisions prescribed by the first and fifth articles of the unratified convention, concluded at the city of Mexico on the twentieth day of November, one thousand eight hundred and forty-three;* and in no case shall an award be made in favor of any claim not embraced by these principles and rules.

If, in the opinion of the said board of commissioners, or of the claimants any books records or documents in the possession or power of the government of the Mexican republic, shall be deemed necessary to the just decision of any claim, the commissioners, or the claimants through them, shall, within such period as Congress may designate, make an application in writing for the same,

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* For these articles, see the end of this treaty, p. 128.

addressed to the Mexican Minister for Foreign Affairs, to be transmitted by the Secretary of State of the United States; and the Mexican government engages at the earliest possible moment after the receipt of such demand, to cause any of the books, records, or documents, so specified, which shall be in their possession or power, (or authenticated copies or extracts of the same,) to be transmitted to the said Secretary of State, who shall immediately deliver them over to the said board of commissioners: *Provided*, That no such application shall be made by, or at the instance of, any claimant, until the facts which it is expected to prove by such books, records, or documents, shall have been stated under oath or affirmation.

ARTICLE XVI.

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

The treaty of amity, commerce, and navigation, concluded at the city of Mexico on the fifth day of April. A. D. 1831, between the United States of America and the United Mexican States, except the additional article, and except so far as the stipulations of the said treaty may be incompatible with any stipulation contained in the present treaty, is hereby revived for the period of eight years from the day of the exchange of ratifications of this treaty, with the same force and virtue as if incorporated therein; it being understood that each of the contracting parties

reserves to itself the right, at any time after the said period of eight years shall have expired, to terminate the same by giving one year's notice of such intention to the other party.

ARTICLE XVIII.

All supplies whatever for troops of the United States in Mexico, arriving at ports in the occupation of such troops previous to the final evacuation thereof, although subsequently to the restoration of the custom-houses at such ports, shall be entirely exempt from duties and charges of any kind: the government of the United States hereby engaging and pledging its faith to establish, and vigilantly to enforce, all possible guards for securing the revenue of Mexico, by preventing the importation, under cover of this stipulation, of any articles other than such, both in kind and in quantity, as shall really be wanted for the use and consumption of the forces of the United States during the time they may remain in Mexico. To this end, it shall be the duty of all officers and agents of the United States to denounce to the Mexican authorities at the respective ports any attempts at a fraudulent abuse of this stipulation which they may know of or may have reason to suspect, and to give to such authorities all the aid in their power with regard thereto; and every such attempt, when duly proved and established by sentence of a competent tribunal, shall be punished by the confiscation of the property so attempted to be fraudulently introduced.

ARTICLE XIX.

With respect to all merchandise, effects, and property whatsoever, imported into ports of Mexico whilst in the occupation of the forces of the United States, whether by citizens of either republic, or by citizens or subjects of any neutral nation, the following rules shall be observed: –

1. All such merchandise, effects, and property, if imported previously to the restoration of the custom-houses to the Mexican authorities, as stipulated for in the third article of this treaty, shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.

2. The same perfect exemption shall be enjoyed by all such merchandise, effects, and property, imported subsequently to the restoration of the custom-houses, and previously to the sixty days fixed in the following article for the coming into force of the Mexican tariff at such ports respectively; the said merchandise, effects, and property being, however, at the time of their importation, subject to the payment of duties, as provided for in the said following article.

3. All merchandise, effects, and property described in the two rules foregoing shall, during their continuance at the place of importation, and upon their leaving such place for the interior, be exempt from all duty, tax, or impost of every kind, under whatsoever title or denomination. Nor shall they be there subjected to any charge whatsoever upon the sale thereof.

4. All merchandise, effects, and property, described in the first and second rules, which shall have been

removed to any place in the interior whilst such place was in the occupation of the forces of the United States, shall, during their continuance therein, be exempt from all tax upon the sale or consumption thereof, and from every kind of impost or contribution, under whatsoever title or denomination.

5. But if any merchandise, effects, or property, described in the first and second rules, shall be removed to any place not occupied at the time by the forces of the United States, they shall, upon their introduction into such place, or upon their sale or consumption there, be subject to the same duties, which, under the Mexican laws, they would be required to pay in such cases if they had been imported in time of peace, through the maritime custom-houses, and had there paid the duties conformably with the Mexican tariff.

6. The owners of all merchandise, effects, or property described in the first and second rules, and existing in any port of Mexico, shall have the right to reship the same, exempt from all tax, impost, or contribution whatever.

With respect to the metals, or other property, exported from any Mexican port whilst in the occupation of the forces of the United States, and previously to the restoration of the custom-house at such port, no person shall be required by the Mexican authorities, whether general or state, to pay any tax, duty, or contribution upon any such exportation, or in any manner to account for the same to the said authorities.

ARTICLE XX.

Through consideration for the interests of commerce generally, it is agreed, that if less than sixty days should elapse between the date of the signature of this treaty and the restoration of the custom-houses, conformably with the stipulation in the third article, in such case all merchandise, effects, and property whatsoever, arriving at the Mexican ports after the restoration of the said custom-houses, and previously to the expiration of sixty days after the day of the signature of this treaty, shall be admitted to entry; and no other duties shall be levied thereon than the duties established by the tariff found in force at such custom-houses at the time of the restoration of the same. And to all such merchandise, effects, and property, the rules established by the preceding article shall apply.

ARTICLE XXI.

If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a

resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

ARTICLE XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules; absolutely where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible: –

1. The merchants of either republic then residing in the other shall be allowed to remain twelve months, (for those dwelling in the interior,) and six months (for those dwelling at the seaports,) to collect their debts and settle their affairs; during which periods, they shall enjoy the same protection, and be on the same footing, in all respects, as the citizens or subjects of the most friendly nations; and, at the expiration thereof, or at any time before, they shall have full liberty to depart, carrying off

all their effects without molestation or hindrance, conforming therein to the same laws which the citizens or subjects of the most friendly nations are required to conform to. Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons. Nor shall their houses or goods be burnt or otherwise destroyed, nor their cattle taken, nor their fields wasted, by the armed force into whose power, by the events of war, they may happen to fall; but if the necessity arise to take any thing from them for the use of such armed force, the same shall be paid for at an equitable price. All churches, hospitals, schools, colleges, libraries, and other establishments for charitable and beneficent purposes, shall be respected, and all persons connected with the same protected in the discharge of their duties, and the pursuit of their vocations.

2. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant inclement or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships, or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have comfortable quarters; and the common soldier shall be disposed in cantonments,

open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for its own troops. But if any officer shall break his parole by leaving the district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall be dealt with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of the same articles, as are allowed, either in kind or by commutation, to officers of equal rank in its own army; and all others shall be daily furnished with such ration as is allowed to a common soldier in its own service: the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party, on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other; which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or

taxes, and to distribute, whatever comforts may be sent to them by their friends; and shall be free to transmit his reports in open letters to the party by whom he is employed.

And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided: and during which, its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

ARTICLE XXIII.

This treaty shall be ratified by the President of the United States of America, by and with the advise and consent of the Senate thereof; by the President of the Mexican republic, with the previous approbation of its General Congress; and the ratifications shall be exchanged in the city of Washington, or at the seat of government of Mexico, in four months from the date of the signature hereof, or sooner if practicable.

In faith whereof, we the respective plenipotentiaries, have signed this treaty of peace, friendship, limits, and settlement; and have hereunto affixed our seals respectively. Done in quintuplicate, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord one thousand eight hundred and forty-eight.

N.P. TRIST, [L. S.]
LUIS G. CUEVAS, [L. S.]

BERNARDO COUTO, [L. S.]

MIGL. ATRISTAIN, [L. S.]

## ARTICLES REFERRED TO IN THE FIFTEENTH ARTICLE OF THE PRECEDING TREATY.

*First and Fifth Articles of the unratified Convention between the United States and the Mexican Republic of the 20th November, 1543.*

### ARTICLE I.

All claims of citizens of the Mexican republic against the government of the United States, which shall be presented in the manner and time hereinafter expressed, and all claims of citizens of the United States against the government of the Mexican republic, which, for whatever cause, were not submitted to, nor considered, nor finally decided by, the commission, nor by the arbiter appointed by the convention of 1839, and which shall be presented in the manner and time hereinafter specified, shall be referred to four commissioners, who shall form a board, and shall be appointed in the following manner, that is to say: Two commissioners shall be appointed by the President of the Mexican republic, and the other two by the President of the United States with the approbation and consent of the Senate. The said commissioners, thus appointed, shall, in presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations and the treaties between the two republics.

ARTICLE V.

All claims of citizens of the United States against the government of the Mexican republic, which were considered by the commissioners, and referred to the umpire appointed under the convention of the eleventh April, 1839, and which were not decided by him, shall be referred to, and decided by, the umpire to be appointed, as provided by this convention, on the points submitted to the umpire under the late convention, and his decision shall be final and conclusive. It is also agreed, that if the respective commissioners shall deem it expedient, they may submit to the said arbiter new arguments upon the said claims.

CHAP. CIII. – *An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor-General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor-General of Oregon; he shall have proper allowances for clerk hire, office rent, and fuel, not exceeding what now is or hereafter may be allowed by law to the said Surveyor-General of Oregon; and he shall locate his office from time to time at such places as may be directed by the President of the United States.

SEC. 2. *And be it further enacted,* That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years, who has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter-section, or one hundred and sixty

acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however,* That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

SEC. 3. *And be it further enacted,* That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor-general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if approved by the Secretary of the Interior, a patent shall issue thereon: *Provided, however,* That on the death of any such settler before the completion of the four years' occupancy and cultivation required by this act, the right shall descend to his heirs at law, who shall be entitled to a certificate and patent, as aforesaid, on proof, as before provided, of continued occupancy and cultivation by such settler to the time of his death: *Provided, however,* That when lands are claimed under any of the provisions of this act by persons who are not citizens of the United States, patents shall not issue therefor until they become citizens.

SEC. 4. *And be it further enacted,* That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands

settled on and occupied for purpose of trade and commerce, and not for agriculture, and all legal subdivisions settled on and occupied, in whole or in part, for purposes of trade and commerce, and not for agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold.

SEC. 5. *And be it further enacted,* That when the lands in the said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same.

SEC. 6. *And be it further enacted,* That, when the lands in said Territory shall be surveyed as aforesaid, a quantity of land equal to two townships shall be, and the same is hereby, reserved for the establishment of a University in said Territory, and in the State hereafter to be created out of the same, to be selected, under the direction of the legislature, in legal subdivisions of not less than one half-section.

SEC. 7. *And be it further enacted,* That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preëmption Act of fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where

the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

SEC. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bonâ fide* grants, and

give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

SEC. 9. *And be it further enacted,* That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act.

SEC. 10. *And be it further enacted,* That the President of the United States shall be and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office rent, fuel, incidental expenses, and clerk hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

SEC. 11. *And be it further enacted,* That said Surveyor-General shall cause the necessary surveys to be made in said Territories of standard meridian, base, and parallel lines, and of township and subdivisional lines, under such rules and regulations as shall be prescribed by the Commissioner of the General Land-Office.

SEC. 12. *And be it further enacted,* That all the lands to which the Indian title has been or shall be extinguished

within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preëmption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned; *Provided, however,* That where unsurveyed lands are claimed by preëmption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such lands shall forfeit all right thereto: *Provided,* said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

SEC. 13. *And be it further enacted,* That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the president may deem expedient; and he is hereby authorized to appoint, by and with the advice and consent of the Senate, a Register and Receiver of Public Moneys for each of said districts, who shall each be required to reside at the site of their respective offices, and they shall have the same powers, perform the same duties, and be entitled to the same compensation as are or may be prescribed by law in relation to other land-offices

of the United States. And the President is hereby authorized to cause the surveyed lands to be exposed for sale from time to time, in the same manner and upon the same terms and conditions as the other public lands of the United States.

APPROVED, July 22, 1854.

SENATE.

36TH CONGRESS, 1st Session. ) ( REP. COM. No. 228.

IN THE SENATE OF THE UNITED STATES.

MAY 19, 1860. – Ordered to be printed.

Mr. BENJAMIN made the following

REPORT.

[To accompany Bill H. R. 195.]

*The Committee on Private Land Claims, to whom were referred House bill No. 195 and various reports of the surveyor general of the Territory of New Mexico, in relation to private land claims in said Territory, have the honor to report:*

That, after examination of the various claims mentioned in the letter of said surveyor general to the Commissioner of the General Land Office, dated the 12th of January, 1858, they concur in the recommendation of the said officer that the said claims should be confirmed, with two exceptions, which they now proceed to notice.

The claim of John Scolly and others, being No. 9 on said list, is recommended by the surveyor general for confirmation for twenty-five square leagues. A careful examination of this claim, the evidence given in support of it, and the report of the surveyor general, have failed to satisfy your committee that said claim is valid for more than five square leagues. The grant was for *"cinco leguas*

*cuadradas,"* which your committee interpret as meaning five square leagues, and not five leagues square; and although the claimants were put in possession of five leagues square – that is, of twenty-five square leagues – yet this was done by a local magistrate only two years before the acquisition of the territory by the United States, and does not seem even to have been brought to the notice of, or to have been approved by, the superior authorities. The claim made is under a petition which originally prayed for *"diez leguas cuadradas;"* that is, for ten square leagues, and after various proceedings was *restricted,* according to the language of the petitioners themselves, to *"cinco leguas cuadradas."* The two expressions are identical in form, and if by *"cinco leguas cuadradas"* twenty-five square leagues were meant, then under the original petition the prayer for a grant of *"diez leguas cuadradas"* was a prayer for one hundred square leagues. This proposition is too extravagant for belief, and your committee therefore recommend that the confirmation of the claim of Scolly and others be restricted to five square leagues.

The second exception made by your committee is in relation to claim No. 17, which the surveyor general recommends in favor of Cornelio Vigil and Ceran St. Vrain for the full extent embraced in a survey annexed to the papers. The quantity of land embraced in this survey does not appear; but by a close examination of some of the distances shown, and a rough calculation of the others, there cannot well be less than one hundred square leagues, and possibly much more. Now, a reference to the petition and grant shows that the claimants, on the 8th December, 1843, petitioned Governor Armijo, stating that

they had "examined the land embraced within the Huerfano, Piripa, and Cucharas rivers to their junction with the Arkansas and Aminas rivers, and finding sufficient fertile land for cultivation, an abundance of pasture and water, &c., they pray you to *grant to each one of us a tract of land in the above-mentioned locality,* protesting that, in the coming spring, we will commence operations which will be continued *until the colony shall be established and settled,*" &c.

On the 9th December, 1843, the governor referred this petition "to the justice of the peace of the proper jurisdiction, who will *give the possession referred to by the petitioners,* as this government desires to encourage agriculture and the arts."

On the 25th December, 1843, the two claimants presented a petition to the justice of the peace, setting forth that the governor had granted them "*the public land contained in the accompanying petition,*" and asking the execution of his order.

Under these petitions and orders the two claimants were placed by the justice of the peace, on the 2d January, 1844, in possession; not each "of a tract of land in the above-mentioned locality," but were jointly put in possession of the whole district of country, including the lands on both banks of three tributaries of the Napeste or Arkansas river, from their mouths nearly to their sources, and without the slightest apparent warrant in the governor's order for so exorbitant a grant.

If this demarkation of boundaries by the justice of the peace had been afterwards brought to the notice of the governor, and approved by him, a grave question would

still remain as to his power to concede entire districts of country without the authorization of the provincial assembly or the Mexican Congress; but your committee find no proof in the paper of approval of this action by any officer superior to the justice of the peace, and as his power clearly could not go beyond the execution of the governor's orders, your committee cannot concur in the recommendation of the surveyor general that this grant be confirmed for the full extent claimed. It is, however, plain that these parties are entitled to have their title confirmed to some extent; and this involves the inquiry as to the true meaning of the words "a tract of land," claimed in the original petition.

Under the Mexican colonization law of 1824, and the regulations of 1828, the extreme quantity allowed to be granted by the governor to any colonist was eleven square leagues. In the absence of any other guide, your committee suggest that a restriction of the confirmation to an extent of eleven square leagues for each claimant would be the utmost they could fairly expect, and would be not only a fair but a liberal compliance with the obligation imposed on the good faith of the United States under the terms of the treaty of Guadalupe Hidalgo.

In relation to the proper location of these tracts, a difficulty would arise, resulting from the fact, ascertained by your committee, that a certain number of settlers, represented to be forty or fifty, have settled on tracts of land conceded to them by the above-mentioned grantees, in different parts of the tract set apart for them by the justice of the peace; so that, if the two tracts of eleven leagues each were located in any part of the district of country referred to, the location would necessarily

exclude some of these settlers, who have gone on to the land in good faith and ought not to be disturbed. This difficulty can only be avoided by surveying the tracts of these actual settlers, wherever found within the district, and deducting their area from the area of the two eleven league tracts, leaving the remainder only of these two tracts to be located in one body. To this mode of location the claimants, who were represented before your committee by Judge Watts, as their counsel, and one of whom, Ceran St. Vrain, was present in person, have given their consent; and the committee has made, therefore, proper provision in the bill.

The second report of the surveyor general of said Territory was communicated to the Senate by the Secretary of the Interior, by letter addressed to the Vice-President, under date of 3d February, 1860, and consists of an abstract marked Exhibit A, comprehending nineteen claims, numbered from twenty to thirty-eight, both inclusive.

The bundles of papers containing the copies of the titles, the evidence, and the report of the surveyor general on each claim separately, have been examined by the committee; and they concur fully in the reports of that officer, recommending the confirmation of all said claims, except that which is numbered twenty-six, in the name of Juan B. Vigil.

The surveyor general recommends the rejection of this last-mentioned claim, and your committee concur with him in the opinion that it ought not to be confirmed; but the claimants' appeal to Congress, which ought not, in the judgment of the committee, to take the decision of

the matter into its own hands, and refuse the claimants an opportunity of establishing their rights in a court of justice, if they can.

Amongst the claims embraced, however, in this second report, and recommended for confirmation, are two which cover the same tract of land, and are embraced in one number, to wit, No. 20.

To this tract the two claimants are: First. The heirs of Luis Maria Baca claim under a grant made by the provincial deputation of Durango to said Baca and *his seventeen sons* on the 29th May, 1821, which grant was ratified and confirmed on the – February, 1825, by the departmental assembly of New Mexico. This grant was in fee, and is a genuine and valid title. Second. The town of Las Begas or Las Vegas. This town claims under a grant made on the 25th March, 1835, to Juan de Dios Mase and twenty-seven others, by the territorial deputation, on a petition which represented the land to be *public land*, and the petitioners were put in possession. The land has been divided out, and several hundred families are located on it.

The surveyor general having none but ministerial duties to perform, has recommended the confirmation of both these titles, leaving to the respective claimants the right of adjusting their conflicting claims in the courts. But Congress has other duties imposed on it, and is bound to legislate in such manner as to prevent, if possible, so disastrous a result as the plunging of an entire settlement of families into litigation, at the imminent hazard of being turned out of their homes, or made to purchase a second time, from a private owner, lands for which they paid their government a full equivalent, in the

labor, risk, and exposure by which they have converted a wilderness, surrounded by hostile savages, into a civilized and thriving settlement; and this can be done with little loss or costs to the government.

The claimants under the title to Baca, also represented by Judge Watts as their counsel, have expressed a willingness to waive their older title in favor of the settlers, if allowed to enter an equivalent quantity of land elsewhere within the Territory; and your committee cannot doubt that Congress will cheerfully accept the proposal, which, indeed, would undoubtedly have been acceded to by Mexico if the Territory had remained hers, and to whose rights and duties the United States have succeeded.

The committee have therefore prepared an amendment to the House bill, by way of substitute, embracing the several provisions above referred to.

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CHAP. CLXVII. – *An Act to confirm certain Private Land Claims in the Territory of New Mexico.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor-general as number sixteen, be, and they are hereby, confirmed: *Provided,* That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

SEC. 2. *And be it further enacted,* That in surveying the claim of said John Scolly it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square

leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section.

SEC. 3. *And be it further enacted,* That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

SEC. 4. *And be it further enacted,* That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

SEC. 5. *And be it further enacted,* That it shall or may be lawful for the said Juan B. Vigil or any person claiming title under him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not confirmed under the provisions of the third section of this act; said suit to be instituted in the supreme court of the Territory of New Mexico, to be defended by the district-attorney of the United States for

said Territory, under the direction of the Attorney-General of the United States, with the right of appeal to either party from the decision of said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said supreme court of the Territory of New Mexico, and not thereafter: *Provided* That if the suit authorized by this section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: *And provided further,* That in the determination of the suit authorized to be instituted by the terms of this section, the courts shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 6. *And be it further enacted,* That it shall be lawful for the heirs of Luis Maria Baca, who made claim to the said tract of land as is claimed by the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when there-unto required by them: *Provided, however,* That the right hereby granted to said heirs of Baca shall

continue in force during three years from the passage of this act, and no longer.

APPROVED, June 21, 1860.

CHAP. CXXIII. – *An Act to amend an Act entitled "An Act to confirm certain private Land Claims in the Territory of New Mexico."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the sixth section of the act entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June twenty-first, eighteen hundred and sixty, be, and the same is hereby, so amended as to enable the heirs of Luis Maria Baca to raise and withdraw the selection and location of one of the square bodies of land confirmed to them by said act, heretofore located by said heirs on the Pecos River, adjoining the Fort Sumner reservation, and to select and re-locate the same, in the manner provided by said act, at any time before the twenty-first day of June, in the year eighteen hundred and sixty-five, upon any of the public lands, unoccupied and not mineral, within the limits of the Territory of New Mexico, as said limits were known and defined by law on the twenty-first day of June, in the year eighteen hundred and sixty; and upon such selection and re-location, the title to said square body of land, the same being the one fifth part of the private claim confirmed to said heirs as aforesaid, so selected and re-located, shall be, and is hereby, confirmed to the said heirs of the said Luis Maria Baca as fully and perfectly as if the same had been selected and located within three years from and after the approval of the act aforesaid.

SEC. 2. *And be it further enacted,* That upon such selection and relocation all right, title, and interest of the said heirs of Luis Maria Baca, of, in, and to the square body of land heretofore selected and located by them on the Pecos

River, adjoining the Fort Sumner reservation in New Mexico, is hereby divested and declare null and void, and the same shall revest in the government of the United States.

APPROVED, June 11, 1864.

**Calendar No. 999**

SENATE

101ST CONGRESS )
*2d Session* )

( REPORT
( 101-538

# BACA LOCATION NO. 1 LAND ACQUISITION AND STUDY ACT OF 1990

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OCTOBER 18 (legislative day OCTOBER 2), 1990. – Ordered to be printed

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Mr. JOHNSON, from the Committee on Energy and Natural Resources, submitted the following

## REPORT

[To accompany S. 2521]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2521) to exchange certain lands in the State of New Mexico and for other purposes, having considered the same, reports favorably thereon with an amendment and an amendment to the title and recommends that the bill as amended do pass.

The amendment is as follows:

1. Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Baca Location No. 1 Land Acquisition and Study Act of 1990".

SEC. 2. PURPOSES AND DEFINITIONS.

(a) PURPOSES. – The purposes of this Act are to –

(1) authorize the Secretary to acquire by purchase certain lands in the State of New Mexico to be added to the Santa Fe National Forest;

(2) compensate Dunigan Enterprises for costs incurred as a result of certain Federal actions; and

(3) provide for a study to determine possible Federal protection of certain lands in New Mexico known as "Baca Location No. 1".

(b) As used in this Act, the term –

(1) "Baca Location No. 1" means the land owned by Dunigan Enterprises located in the Jemez Mountains west of Los Alamos, New Mexico, in Sandoval and Rio Arriba counties and consisting of approximately 100,000 acres, as generally depicted on the map entitled "1510 – Sante Fe NF – S. 2521 Cochiti Land Exchange Act" and dated October, 1990;

(2) "Dunigan Enterprises" means Dunigan Enterprises, Inc., a Texas corporation, and BL&C Co. and BL&C Co. No. 2, Texas Partnerships; and

(3) "Secretary" means the Secretary of Agriculture.

SEC. 3. ACQUISITION

(a) IN GENERAL. – The Secretary is authorized to acquire by purchase with donated or appropriated funds the lands described in subsection (b). Upon acquiring the

lands, the Secretary shall include them within the Santa Fe National Forest and shall administer them accordingly.

(b) DESCRIPTION OF LANDS TO BE ACQUIRED. – The lands to be acquired pursuant to subsection (a) consist of two parcels totaling approximately 36 acres, and are more specifically described as follows:

(1) PARCEL 1. – Beginning at Mile Point No. 11 on the south boundary of Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to its intersection with the constructed centerline of Forest Development Road 133; thence on a continuation of the south boundary of Baca Location No. 1, 33 feet; thence on an approximate bearing of N. 26° E., about 720 feet as scaled from the Forest Service's topographic map of the area, to the south boundary of the easement for New Mexico State Highway No. 4; thence in an easterly direction along the State Highway easement to its intersection with the south boundary of Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 11, containing approximately 27 acres, and subject to confirmation by formal survey and acceptable legal description and record acreage.

(2) PARCEL 2. – Beginning at Mile Point No. 10 on the south boundary of Baca Location No. 1; thence in a westerly direction along the south boundary of Baca Location No. 1, 423 feet to a point on the west side of the East Fork of the Rio Jemez; thence N. 38° E., 660 feet; thence N. 86° E., 170 feet; thence S. 70° E., 364 feet to the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 10, containing

approximately 9 acres, and subject to confirmation by formal survey and acceptable legal description and record acreage.

SEC. 4. COMPENSATION.

(a) IN GENERAL. – The Secretary of the Treasury is authorized and directed, subject to the provisions of subsection (b), to pay a direct payment to Dunigan Enterprises not to exceed $1,633,527 out of any money in the Treasury not otherwise appropriated to compensate Dunigan Enterprises for costs incurred as a result of certain Federal actions involving a land exchange between the United States and Dunigan Enterprises in 1966.

(b) CERTIFICATION. – (1) The Secretary of the Treasury may make the payment described in subsection (a), only after the Secretary, acting through the Inspector General of the United States Department of Agriculture certifies that –

(A) the sum accurately reflects the damages incurred by Dunigan Enterprises resulting from the 1966 land exchange in New Mexico between the United States and Dunigan Enterprises;

(B) Dunigan Enterprises has executed a release of all claims relating to the real property known as the "Cochiti Properties", approximately 2,456.14 acres as described in the quitclaim deed to the Baca Land and Cattle Company, et al., on September 25, 1966, as recorded in Volume 21, pages 361-363 of the Sandoval County, New Mexico records; and

(C) Dunigan Enterprises has executed with the Department of Justice an appropriate joint stipulation for entry of an order of dismissal, with prejudice, of the pending litigation between Dunigan Enterprises and the United States, entitled *Dunigan Enterprises, Inc. et al. v. United States*, No. 506-88L, United States Claim Court.

(2)(A) In making the verification pursuant to paragraph (1), the Secretary shall consider costs incurred by Dunigan Enterprises as a result of the 1966 land exchange between the United States and Dunigan Enterprises, including but not limited to foregone proceeds on sales contracts, and reasonable expenses for travel, telephone calls, legal services and other miscellaneous costs.

(B) If the Secretary determines pursuant to the certification requirement required in paragraph (1) that Dunigan Enterprises has incurred damages of less than $1,633,527, then Dunigan Enterprises shall be paid such lesser amount pursuant to subsection (a).

SEC. 5. LAND OWNERSHIP ADJUSTMENT STUDY.

(a) IN GENERAL. – (1) The Secretary is authorized and directed to conduct a study of Baca Location No. 1 to address –

(A) the scenic, geologic, recreational, timber, mineral, grazing, and other multiple use attributes of Baca Location No. 1; and

(B) options for Federal acquisition of Baca Location No. 1, in whole or part, by purchase, donation, exchange, or otherwise, including the estimated cost of each option.

(2) The Secretary shall complete the study within 2 full fiscal years after the date funds are made available for the study.

(b) COOPERATION. – (1) The Secretary shall prepare the study required by subsection (a) in cooperation with the owner of Baca Location No. 1, interested Indian tribes, the National Park Service, the United States Fish and Wildlife Service, and other interested parties.

(2) This Act shall not be construed to authorize entry upon Baca Location No. 1 by any person without the express permission of the landowner, and the Secretary shall make prior arrangements with the landowner for satisfactory access to Baca Location No. 1 for the purposes of the study.

(c) TRANSMITTAL OF STUDY. – Upon the completion of the study referred to in subsection (a), the Secretary shall transmit the results of such study, along with any legislative recommendations to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Interior and Insular Affairs and Agriculture of the United States House of Representatives.

SEC. 6. TECHNICAL CORRECTION.

Section 110(a)(2) of the San Juan Basin Wilderness Protection Act of 1984, Public Law 98-603 (98 Stat. 3159) is hereby amended to read as follows:

> "(2) The real property referred to in paragraph (1) is located in Lake Sumner State Park, in the State of New Mexico, and is more particularly described as follows:

"all portions of sections 28 and 33 in Township 5 North, Range 24 East, with an elevation of more than 4,280 feet above sea level. The acreage and legal description of such real property shall be determined by the Secretary, after consultation with Sumner Lake Corporation.".

SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this provisions of this Act.

2. Amend the title so as to read:

A bill to authorize the Secretary of Agriculture to acquire and study certain lands in the State of New Mexico, and for other purposes.

PURPOSE OF THE MEASURE

The purposes of S. 2521, as ordered reported, are to authorize the Secretary of Agriculture to acquire approximately 36 acres of land in New Mexico for inclusion in the Santa Fe National Forest, to direct the Secretary of the Treasury to compensate the Dunigan Enterprises corporation for damages incurred as a result of a 1966 land exchange between the company and the United States, and to direct the Secretary of Agriculture to study the Baca Location No. 1 lands in New Mexico to determine options for Federal acquisition.

## Background and Need

In 1966, Dunigan Enterprises, Inc., a Texas-based corporation, entered into a land exchange at the request of the Forest Service, whereby Dunigan conveyed 970 acres for inclusion in the Santa Fe National Forest and received 2,456 acres of land located between Albuquerque and Santa Fe. The land received by Dunigan was part of the "La Majada" land grant. Dunigan received a quitclaim deed from the United States at the time of the conveyance.

In 1979, Dunigan sold 1,030 acres of the land it had received in the 1966 exchange to another corporation, Colony Materials, Inc. In 1982, the Pueblo of Santo Domingo claimed ownership of part of the land originally conveyed by the Forest Service to Dunigan, including 208 acres of the parcel conveyed by Dunigan to Colony Materials. In 1982, Colony was notified by the Department of the Interior that the 208 acre parcel was in fact owned by the Santo Domingo Pueblo.

Dunigan filed suit in 1984 in Federal district court seeking to quiet title. The court ruled that because Dunigan did not file its claim within the 12-year statute of limitation period required under Federal law (28 U.S.C. 2409a(f)), Dunigan's suit was dismissed.

In 1986, Dunigan settled with Colony Materials and the Santo Domingo Pueblo, which allowed Colony to keep 960 acres of the original 1,030. In addition, Dunigan forgave approximately $400,000 of the original purchase price. Pursuant to its claim, the Santo Domingo Pueblo acquired approximately 500 acres of the La Majada grant. Dunigan kept 950 acres, and retained the right to sue the

Federal Government. In August 1988, Dunigan filed suit against the United States, claiming damages of approximately $2 million.

S. 2521 would compensate Dunigan approximately $1.63 million for damages incurred as a result of the 1966 land exchange. In addition, the bill would authorize the Secretary of Agriculture to acquire approximately 36 acres of land owned by Dunigan for addition to the Santa Fe National Forest. The bill also directs the Secretary to study an approximately 100,000-acre area in New Mexico known as "Baca Location No. 1" to determine options for Federal acquisition.

## Legislative History

S. 2521 was introduced by Senators Bingaman and Domenici on April 25, 1990. Companion legislation, H.R. 4630, introduced by Congressman Richardson, passed the House of Representatives on October 10, 1990. The Subcommittee on Public Lands, National Parks and Forests held a hearing on S. 2521 on July 27, 1990.

At the business meeting on September 26, 1990, the Senate Committee on Energy and Natural Resources ordered S. 2521, as amended, favorably reported.

## Committee Recommendations and Tabulation of Votes

The Senate Committee on Energy and Natural Resources, in open business session on September 26, 1990, by an unanimous vote of a quorum present, recommends that the Senate pass S. 2521, if amended as described herein.

The roll call vote on reporting the measure was 18 yeas, 0 nays, and 1 present, as follows:

| YEAS | NAYS | PRESENT |
|---|---|---|
| Mr. Johnston | | Mr. Domenici |
| Mr. Bumpers | | |
| Mr. Ford | | |
| Mr. Bradley | | |
| Mr. Bingaman* | | |
| Mr. Wirth* | | |
| Mr. Conrad | | |
| Mr. Heflin* | | |
| Mr. Rockefeller | | |
| Mr. Akaka* | | |
| Mr. McClure | | |
| Mr. Hatfield* | | |
| Mr. Wallop | | |
| Mr. Murkowski | | |
| Mr. Nickles* | | |
| Mr. Burns | | |
| Mr. Garn* | | |
| Mr. McConnell* | | |

*Indicates voted by proxy.

## Committee Amendment

During the consideration of S. 2521, the Committee adopted an amendment in the nature of a substitute. As introduced, S. 2521 authorized a land exchange between Dunigan Enterprises and the United States, provided for a direct payment of cash to Dunigan in compensation for damages resulting from the 1966 land exchange, and authorized a study of the Baca Location No. 1 property. The Committee amendment deletes the land exchange provisions, but retains the cash payment to Dunigan and study of the Baca Location No. 1. The amendment also

makes numerous technical, clarifying and conforming changes. The amendment is described in detail in the Section-by-Section Analysis below.

The Committee also adopted an amendment to the title.

## Section-by-Section Analysis

*Section 1* entitles the Act, the "Baca Location No. 1 Land Acquisition and Study Act of 1990."

*Section 2* sets forth the purposes of the Act and defines certain terms used in the Act.

*Section 3(a)* authorizes the Secretary of Agriculture (the "Secretary") to purchase approximately 36 acres in New Mexico for addition to the Santa Fe National Forest.

Subsection (b) defines the lands to be acquired. The two parcels, which are owned by Dunigan Enterprises, Inc. ("Dunigan"), are located near the southern boundary of the Baca Location No. 1 property.

*Section 4(a)* authorizes and directs the Secretary of the Treasury, subject to the provisions of subsection (b), to pay a sum of money not to exceed $1,633,527 to Dunigan, to compensate Dunigan for damages incurred as a result of a 1966 land exchange with the Forest Service.

Subsection (b) provides that the Secretary of the Treasury may only make the payment to Dunigan after the Inspector General of the Department of Agriculture certifies that the sum to be paid accurately reflects the damages incurred by Dunigan as a result of the 1966 land exchange. The Inspector General must also certify that

Dunigan has executed a release of all claims relating to the 2,456 acre parcel known as the "Cochiti properties," and that Dunigan has executed a joint stipulation with the Department of Justice of an order of dismissal, with prejudice, of the pending litigation between the United States and Dunigan.

Subparagraph (2)(A) of the subsection sets forth the criteria the Inspector General is to consider in making the determination whether the amount to be paid to Dunigan is appropriate.

Subparagraph (2)(B) of the subsection states that if a lower sum is established as the correct amount of compensation pursuant to the certification process, then Dunigan is to be paid that lesser amount.

*Section 5(a)* authorizes and directs the Secretary to conduct a study of the approximately 100,000-acre Baca Location No. 1 property to assess the various resources located on the property and to address options for Federal acquisition of the property, in whole or part, by purchase, donation, exchange, or otherwise. The study is to be completed within 2 full fiscal years after the date funds are made available for the study.

Subsection (b) provides that the Secretary is to prepare the study in cooperation with the owner of Baca Location No. 1 (currently owned by Dunigan), interested Indian tribes, the National Park Service, the U.S. Fish and Wildlife Service, and other interested parties. The subsection clarifies that the Act does not provide any authorized entry on to the property except with the express permission of the landowner.

Subsection (c) states that upon the completion of the study, the Secretary is to transmit the results of the study, along with any legislative recommendations, to the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs.

*Section 6* makes a technical correction to the San Juan Basin Wilderness Protection Act of 1984. The amendment corrects the legal description of land in New Mexico that the Secretary of the Interior is authorized to convey to the Sumner Lake Corporation of the State of New Mexico.

*Section 7* authorizes the appropriation of such sums as may be necessary to carry out the provisions of this Act.

## Cost and Budgetary Consideration

The Congressional Budget Office estimate of the costs of this measure has been requested but was not received at the time the report was filed. When the report is available, the Chairman will request it to be printed in the Congressional Record for the advice of the Senate.

## Regulatory Impact Evaluation

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2521. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2521, as ordered reported.

## Executive Communications

On July 17, 1990, the Committee on Energy and Natural Resources requested legislative reports from the Department of Agriculture and the Office of Management and Budget setting forth executive views on S. 2521. On July 24, 1990, the Committee also requested reports from the Department of Justice. These reports had not been received at the time the report on S. 2521 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the Forest Service at the Subcommittee hearing follows:

### Statement of Jeff M. Sirmon, Deputy Chief, Forest Service, U.S. Department of Agriculture

Mr. Chairman and members of the Subcommittee: Thank you for the opportunity to offer the Department of Agriculture's views on S. 2521, the "Cochiti Land Exchange Act of 1990," and S. 2527, the "Enchanted National Forest Information and Education Study Act of 1990."

The Department of Agriculture supports the purposes of S. 2521, but we suggest some technical and clarifying amendents. We support enactment of S. 2527.

While both bills deal with National Forest management in New Mexico, the objectives of each bill are different. Therefore, I will briefly address each bill separately and then will be happy to answer questions.

S.2521, THE "COCHITI LAND EXCHANGE ACT OF 1990"

S. 2521 provides for a land exchange in which the United States would receive 36 acres of private land owned by Dunigan Enterprises in exchange for 1,700 acres of National Forest lands in Sandoval County, New Mexico. In addition, the United States would make a cash payment of approximately $1.1 million to Dunigan Enterprises. The lands received by the United States would be added to the Santa Fe National Forest.

The bill also provides for a cooperative land ownership adjustment study with the owners of Baca Location No. 1 (originally a large Spanish land grant) to address its multiple use attributes and to address options for its possible acquisition by the United States.

Baca Location No. 1 includes approximately 100,000 acres located within, and virtually surrounded by, the Santa Fe National Forest. It was the desire of Mr. Dunigan, now deceased, that the land grant be transferred to public ownership, rather than remain in private ownership and be subject to development. The area is very scenic and has outstanding wildlife and public recreation values. Therefore, we support the cooperative land ownership study. We suggest, however, that Section 7 be amended to remove part (c), which states that the study will not require an environmental impact statement. The

NEPA analysis required to develop an action proposal is best determined after review of the pertinent issues, environmental impacts and public input.

S. 2521 would also resolve a land title problem stemming from a 1966 land exchange between Dunigan Enterprises and the United States. Details regarding the title problem are included in the Supplemental Statement attached to my written statement.

As currently described in S 2521, the land exchange is unequal in appraised value in favor of Dunigan Enterprises. The difference in the appraised value, along with the cash payment provided, would allow Dunigan Enterprises to recover its costs from a clouded title associated with the 1966 exchange. The conveyance of certain National Forest land is part of the compensation package proposed by S. 2521.

We agree that Dunigan Enterprises should be reasonably compensated for its costs. However, we feel that the compensation should be provided entirely in a cash payment. Compensation which provides National Forest land in lieu of cash would set an undesirable precedent which could lead to National Forest lands being used as compensation in future claims against the United States.

Therefore, we suggest that the legislation be amended to provided compensation to Dunigan Enterprises entirely in cash (rather than partially in cash and partially in land). This would increase the cash payment to Dunigan Enterprises provided in Section 4 of S. 2521 and would decrease the National Forest land

involved in the land exchange described in Sections 2 and 3. If these suggested revisions are acceptable, the Forest Service will provide new land description and other pertinent information after discussions with representatives of Dunigan Enterprises.

We estimate that enactment of S. 2521 would result in a Federal cost of $1.3 million. Most of this cost ($1.1 million) in the cash payment to Dunigan Enterprises. The remaining $200,000 would be needed by the Forest Service over the FY 91-93 period to complete the land ownership adjustment study. We have not validated the cash compensation of $1.1 million in Section 4, so can offer no opinion on the amount. If the $1.1 million compensation figure is correct, the total cost of the bill, after including the suggested amendments, is estimated at $1.9 million. In the amended bill, the cost of the landownership adjustment study would remain at $200,000, but the cash compensation cost would increase.

This completes my comments on S. 2521.

HOUSE OF REPRESENTATIVES

101ST CONGRESS ) ) REPT. 101-783
*2d Session* ) ) Part 1

# EXCHANGING CERTAIN LANDS IN THE STATE OF NEW MEXICO, AND FOR OTHER PURPOSES

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OCTOBER 1, 1990. – Ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

**REPORT**

[To accompany H.R. 4630]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 4630) which on April 25, 1990 was referred jointly to the Committees on Interior and Insular Affairs and Agriculture, to exchange certain lands in the State of New Mexico, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Baca Location Number One Act of 1990".

SEC. 2. PURPOSES AND DEFINITIONS.

(a) PURPOSES. – The purposes of this Act are –

(1) to authorize the Secretary to acquire by purchase, donation, or exchange certain lands in the State of New Mexico to be added to the Santa Fe National Forest.

(2) to compensate Dunigan Enterprises for costs incurred as a result of Federal actions; and

(3) to provide for a study of the possible Federal protection of certain lands in New Mexico.

(b) DEFINITIONS. – For the purposes of this Act:

(1) The term "Dunigan Enterprises" means Dunigan Enterprises, Incorporated, a Texas corporation, and BL&C and BL&C Co. No. 2, Texas partnerships.

(2) The term "Secretary" means the Secretary of Agriculture.

SEC. 3. LAND ACQUISITIONS.

(a) The Secretary is authorized to acquire through purchase, donation or exchange the lands described in subsection (b) which total approximately 36 acres. The lands shall become part of the Santa Fe National Forest and shall be administered by the Secretary pursuant to laws applicable to the Santa Fe National Forest. Such

sums as may be necessary to acquire these lands are authorized to be appropriated.

(b) DESCRIPTION OF LANDS. – New Mexico Principal Meridian, Sandoval County Township 19 North, Range 3 East: The portions of the Spanish land grant surveyed and known as Baca Location No. 1 described as follows:

(1) PARCEL 1. – Beginning at Mile Point No. 11 on the south boundary for Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to its intersection with the constructed centerline of Forest Development Road 133; thence on a continuation of the south boundary of Baca Location No. 1, 33 feet; thence on an approximate bearing of N. 26° E., about 720 feet as scaled from the Forest Service's topographic map of the area, to the south boundary of the easement for New Mexico State Highway No. 4; thence in an easterly direction along the State highway easement to its intersection with the south boundary of Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 11, containing about 27 acres, subject to confirmation by formal survey and acceptable plat required to provide an acceptable legal description and record acreage.

(2) PARCEL 2. – Beginning at Mile Point No. 10 of the south boundary of Baca Location No. 1; thence in a westerly direction along the south boundary of Baca Location No. 1, 423 feet to a point on the west side of the east fork of the Rio Jemez; thence N. 38° E., 660 feet; thence N. 86° E., 170 feet; thence S. 70° E., 477 feet; thence S. 34° E., 364 feet to the south boundary of Baca

Location No. 1; thence along the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 10, containing approximately 9 acres, subject to confirmation by formal survey and acceptable plat required to provide an acceptable legal description and record acreage.

SEC. 4. COMPENSATION.

There shall be paid to Dunigan Enterprises a direct payment by the Secretary of the Treasury of not more than $1,634,000 out of any money in the Treasury not otherwise appropriated to compensate the company for costs it incurred as a result of Federal action affecting the title to 2,456 acres of land it received from the United States in 1966 in a land exchange. This sum shall be paid to Dunigan Enterprises only if the Secretary through the Inspector General of the U.S. Department of Agriculture has verified that $1,623,527 accurately reflects damages incurred by Dunigan Enterprises. In making this verification, the Secretary shall consider costs the company incurred as a result of the aforementioned actions for lost land; forgone proceeds on sales contracts; and expenses for travel, telephone calls and legal activities; and the miscellaneous costs. If the Secretary determines that the sum of the damages incurred is less than $1,633,527, Dunigan Enterprises shall be paid the lesser amount.

SEC. 5. LAND OWNERSHIP ADJUSTMENT STUDY.

(a) STUDY. – The Secretary shall conduct a study of Baca Location No. 1 to address –

(1) the scenic, geologic, recreational, timber, mineral, grazing, and other multiple use attributes of Baca Location No. 1; and

(2) options for acquisition of Baca Location No. 1 by the United States, in whole or part, by purchase, exchange, donation, or otherwise, including the estimated cost of each option:

(b) COOPERATION. – (1) The study required by subsection (a) shall be conducted by the Secretary, in cooperation with the owners of Baca Location No. 1, the National Park Service, the United States Fish and Wildlife Service, Native Americans, other interested parties, and the general public.

(2) This Act does not authorize entry upon Baca Location No. 1 by any person without the express permission of the landowner, and the Secretary shall make prior arrangements with the landowner for satisfactory access to the land for purposes of this section.

(c) REPORT. – The Secretary shall report the results of the study required by subsection (a) and any recommendations for legislation not later than 3 full fiscal years after the date of enactment of this Act to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the Senate.

(d) AUTHORIZATION OF APPROPRIATIONS. – There are authorized to be appropriated such funds as are necessary for the study required by subsection (a).

SEC. 6. TECHNICAL CORRECTION.

Section 110(a)(2) of the San Juan Basin Wilderness Protection Act of 1984, Public Law 98-603, 98 Stat. 3159, is amended to read as follows:

> "(2) The real property referred to in paragraph (1) is located in Lake Sumner State Park, in the State of New Mexico, and is more particularly described as follows: all portions of sections 28 and 33 in township 5 north, range 24 east, that are more than 4,280 feet above sea level. The acreage and legal description of such real property shall be determined by the Secretary after consulting with Sumner Lake Corporation."

Amend the title to read as follows:

To acquire and study certain lands in the State of New Mexico, and for other purposes.

PURPOSE

The purpose of H.R.4630[1] is to compensate Dunigan Enterprises for losses it incurred through actions of the Federal Government, to study the Baca Location Number 1 for acquisition by the Federal Government, and to authorize the Secretary of Agriculture to acquire 36 acres to be made part of the Santa Fe National Forest.

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[1] H.R. 4630 was introduced by Mr. Richardson on April 25, 1990.

## Background

H.R. 4630 affects a large parcel of land known as the Baca Location Number 1. Originally, a large Spanish land grant, it includes 100,000 acres owned by Dunigan Enterprises and is surrounded by the Santa Fe National Forest. It contains outstanding wildlife, recreation, scenic, geologic, and cultural resources and has great potential to be added to the Santa Fe National Forest.

In 1966, the United States received 969 acres of the Baca Location from Dunigan Enterprises in exchange for 2,456 acres of National Forest land adjacent to the Santa Domingo Pueblo. Several years after the exchange, the Pueblo made a native American claim on the former national forest lands that had transferred to Dunigan. The Department of the Interior supported the Pueblo's claim. In order to clear title on their new lands, Dunigan, through a negotiated settlement, was required to give the Pueblo 557 acres of the 2,456 acre parcel and paid substantial court costs and legal fees. Since the statute of limitations has expired, legislation is the only remedy for Dunigan Enterprises to recover the costs it incurred through these federal actions which were not brought about through any fault of the company.

## Section-by-Section Analysis

Section 1 designates a short title: "Baca Location Number One Study Act of 1990."

Section 2 states three purposes for the bill; to authorize the Secretary of Agriculture to acquire 36 acres of the Baca Location Number One, to compensate Dunigan

Enterprises for the losses it incurred as a result of the 1966 land exchange with the Santa Fe National Forest, and to establish a study of the potential for the Federal government to acquire the Baca Location Number One to give it protection. The Committee understands that the land is valued between $200,000 and $600,000. The section also defines "Secretary" and "Dunigan Enterprises".

Section 3 authorizes the Secretary of Agriculture to acquire 36 acres of the Baca Location Number One through purchase, donation or exchange. It contains a legal description of the lands and designates them part of the Santa Fe National Forest once they are acquired.

Section 4 directs the Secretary of the Treasury to give Dunigan Enterprises a direct payment from any money in the Treasury not otherwise appropriated to compensate the company for costs it incurred as a result of the federal action that affected its title to 2,456 acres of land it has received from the United States in a land exchange in 1966. The amount of the payment must be determined by the Secretary of Agriculture through the Inspector General of the U.S. Department of Agriculture and can be no more than $1,634,000. In making this determination, the Secretary must consider costs the company incurred for the lost land, forgone proceeds on sales contracts, travel expenses, telephone calls, legal activities and miscellaneous costs.

Section 8 has four subsections:

Subsection (a) directs the Secretary of Agriculture to study the Baca Location Number One. The study will include the scenic, geologic, recreational, timber, mineral, grazing and other multiple use attributes of the tract;

options on how the United States could acquire the tract; and the cost of each option.

Subsection (b) directs the Secretary of Agriculture to conduct the study in cooperation with the owners of the land, the National Park Service, the U.S. Fish and Wildlife Service, other interested parties and the general public. It further directs the Secretary to make arrangements with the landowner to access the tract before conducting the study. It specifically does not authorize entry into the Baca Location Number One without permission of the landowner.

Subsection (c) directs the Secretary of Agriculture to report the results of the study and any recommendations for legislation to the appropriate Committee of Congress within three fiscal years after enactment.

Subsection (d) authorizes funds to be appropriated for the study.

Section 9 makes a technical correction in a land description in Section 110 (a)(2) of the San Juan Basin Wilderness Protection Act of 1984. This provision is identical to H.R. 5215, introduced by Representatives Schiff, Richardson and Skeen.

## Legislative History and Committee Recommendations

H.R. 4630 was referred to the Committee on Interior and Insular Affairs on April 25, 1990. The Subcommittee on National Parks and Public Lands held a hearing on the bill on September 10. On September 11, the Subcommittee adopted an amendment in the nature of a substitute and

favorably reported the bill, as amended, to the Full Committee. On September 19, the Committee on Interior and Insular Affairs adopted the substitute, with amendments, and favorably reported the bill, as amended, to the House by voice vote.

## Inflationary Impact Statement and Budget Act Compliance

Taken in context of the overall budget, the funding involved is insignificant and the Committee believes no inflationary impact will result from the enactment of this legislation. The analysis of the Congressional Budget Office, which the Committee adopts as its own, follows:

U.S. Congress,
Congressional Budget Office,
*Washington, DC, September 27, 1990.*

Hon. Morris K, Udall,

*Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, DC.*

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for H.R. 4630, the Cochiti Land Exchange Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer,
*Director.*

CONGRESSIONAL BUDGET OFFICE – COST ESTIMATE

1. Bill number: H.R. 4630.

2. Bill title: The Cochiti Land Exchange Act of 1990.

3. Bill status: As ordered by the House Committee on Interior and Insular Affairs on September 19, 1990.

4. Bill purpose: H.R. 4630 would authorize the Department of Agriculture (USDA) to purchase 36 acres of land in New Mexico to be added to the Santa Fe National Forest. USDA also would be directed to conduct a land acquisition study of a specified parcel of land in New Mexico.

H.R. 4630 also would direct the Secretary of the Treasury to pay a private landholder (Dunigan Enterprises) in New Mexico up to $1.6 million in compensation for certain costs the landholder incurred as a result of past federal actions.

5. Estimated costs to the Federal Government:

[By Fiscal year, in millions of dollars]

| | 1991 | 1992 | 1993 | 1994 | 1995 |
|---|---|---|---|---|---|
| Direct spending: | | | | | |
| Estimated budget authority | (1) | | | | |
| Estimated outlays | (1) | | | | |
| Authorizations: | | | | | |
| Estimated authorization level | .5 | | | | |
| Estimated outlays | .3 | 0.1 | 0.1 | | |

[1]The payment to Dunigan Enterprises cannot be precisely estimated at this time. Information from USDA indicates that the payment is likely to be between $1 million and $1.6 million. The precise amount will depend on further verification by USDA of the damages incurred by Dunigan Enterprises.

The costs of this bill fall in budget function 300.

Basis of estimate: For purposes of preparing this estimate, CBO assumed that H.R. 4630 would be enacted early in fiscal year 1991 and that the amounts estimated to be needed to carry out the land purchase ($0.3 million) and study activities ($0.3 million) will be provided by the middle of that year. Outlays were estimated based on information provided by USDA. We assume that upon enactment of the bill, the Treasury Department will make a direct payment to Dunigan Enterprises.

6. Estimated costs to State and local governments: None.

7. Estimate comparison: None.

8. Previous estimate: None.

9. Estimate prepared by: Theresa Gullo.

10. Estimate approved by: C.G. Nuckols, for James L. Blum, Assistant Director for Budget Analysis.

## Oversight Statement

The Committee intends to carefully monitor the implementation of this legislation to assure compliance with the intent of the Act. No recommendations were submitted to the Committee pursuant to rule X, clause 2.